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*Commissioner Chong sworn in May 23, 1994.
**Commissioner Ness sworn in June 3, 1994.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Tiger Cable Systems, Incorporated	CSR-4080-M MO0976

Request for Carriage

MEMORANDUM OPINION and ORDER

Adopted: May 5, 1994; Released: May 31, 1994

By the Chief, Cable Services Bureau:

1. On September 21, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch 6), Sedalia, Missouri, was filed with the Commission claiming that Tiger Cable Systems, Incorporated ("Tiger"), operator of a cable television system serving Macks Creek, Missouri, had declined to carry Station KMOS-TV, even though the Grade B contour of Station KMOS-TV encompasses the system's principal headend at Macks Creek[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Station KMOS-TV requests that the Commission not only order Tiger to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed. Station KMOS-TV's petition establishes that it is entitled to carriage on the Tiger cable system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the Complaint filed September 21, 1993 by Central Missouri State University IS GRANTED, in accordance with §615 (j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Tiger Cable Systems, Incorporated IS ORDERED to commence carriage of Station KMOS-TV on cable channel 6, forty-five (45) days from the release of this *ORDER*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that Tiger has not provided its headend coordinates to Station KMOS-TV as required by §76.58(b) of the Rules, despite Station KMOS-TV's letter received by Tiger on May 17, 1993 requesting carriage. Since no opposition to Station KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Tiger's headend is located at Macks Creek, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-3953-M
State University against	MO0928
Friendship Cable of Missouri	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: May 31, 1994

By the Chief, Cable Services Bureau

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Friendship Cable of Missouri ("Friendship"), operator of a cable television system serving Ivy Bend, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Ivy Bend[1] and is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Friendship to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air.

2. On August 5, 1993, Friendship filed an opposition to this complaint, in which it acknowledges that KMOS-TV meets the 1992 Cable Act's tests as a qualified NCE station, because the system is on the edge of KMOS-TV's Grade B contour and located within 50 miles of Sedalia. However, Friendship contends that KMOS-TV failed to deliver a good quality signal to its headend. It argues, therefore, that it is not required to carry KMOS-TV's signal, pursuant to §615(g)(4) of the 1992 Cable Act. In support of its contention, Friendship submits a statement by its field service engineer, Bob Green, that indicates that KMOS-TV delivers an off-air signal to Friendship's headend processing equipment at Ivy Bend that is -2dBmV(-51dBm). Accordingly, Friendship asserts that KMOS-TV does not qualify for carriage on its system serving Ivy Bend, and that its request for carriage should be dismissed.

3. Friendship's objection concerning KMOS-TV's signal strength does not follow generally acceptable engineering practices to determine what constitutes a good quality signal. Although the 1992 Cable Act failed to set a standard for noncommercial educational ("NCE") stations, it did adopt a standard for determining the availabilty of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial stations signals. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine whether a NCE station provides a cable system with a good quality signal. Generally, if the test results for VHF stations are less than -55 dBm, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.

4. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements,[2] cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we conclude that the information submitted by Friendship is insufficient to demonstrate that KMOS-TV does not provide a good quality signal to the cable system's principal headend.

5. Accordingly, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED in accordance with §615(j)(3)(47 U.S.C. §535) of the Communications Act of 1934, as amended, and Friendship Cable of Missouri IS ORDERED to commence carriage of Station KMOS-TV, Sedalia, Missouri, on channel 6 on its cable television system serving Ivy Bend, Missouri, forty-five (45) days from the release date of this *Order* unless Friendship submits the engineering data required herein to support its assertion of poor signal quality at its principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] We note that Friendship has not provided its headend coordinates to KMOS-TV as required by §76.58(b) of the Rules, despite KMOS-TV's letter of December 23, 1992 requesting carriage. As such, we accept petitioner's conclusion that Friendship's headend for this system is located at Ivy Bend, Missouri.

[2] *See* §76.61 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Tristar Cable, Incorporated	CSR-4079 MO0970

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: May 31, 1994

By the Chief, Cable Services Bureau:

1. On September 21, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Tristar Cable, Incorporated ("Tristar"), operator of a cable television system serving Centerview, Missouri, had declined to carry Station KMOS-TV, even though the Grade B contour of Station KMOS-TV encompasses the system's principal headend at Centerview[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Station KMOS-TV requests that the Commission not only order Tristar to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed. Station KMOS-TV's petition establishes that it is entitled to carriage on the Tristar cable system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the Complaint filed September 21, 1993 by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Tristar Cable, Incorporated IS ORDERED to commence carriage of Station KMOS-TV on cable channel 6 forty-five (45) days from the release of this *ORDER*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that Tristar has not provided its headend coordinates to Station KMOS-TV as required by §76.58(b) of the Rules, despite Station KMOS-TV's letter of June 3, 1993, requesting carriage. Since no opposition to Station KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Tristar's headend for this system is located at Centerview, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Adell Broadcasting Corporation against Cablevision Industries	CSR-3860-M MI0515

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1994; Released: May 31, 1994

By the Chief, Cable Services Bureau:

1. On December 28, 1993, an Application for Reconsideration,[1] was filed on behalf of Cablevision Industries ("CVI"), operator of a cable system serving Dearborn, Michigan,[2] requesting that the Commission reconsider its November 10, 1993, action[3] ordering CVI's Dearborn system to carry Station WADL (Ind., Ch. 38), Mount Clemens, Michigan. An opposition to this petition was filed January 7, 1994, on behalf of WADL to which CVI responded on January 18, 1994.

2. In support of its petition, CVI contends that in its original decision, the Bureau's reliance on CBS' letter[4] was misplaced since the letter did not disclose the number of weekly CBS program hours that WADL carried. CVI states that a review of the program schedule submitted with WADL's complaint indicates that WADL carries a total of 15.5 hours of CBS programming per week which would thus make WADL a network station pursuant to §76.55(f) of the Commission's Rules.[5] CVI argues, therefore, that it should not have been ordered to carry the station pursuant to the Commission's must-carry regulations. Moreover, CVI reasserts that there is a broadcast agreement between WADL and CBS. Since this network agreement has not been found in the Commission's files, CVI argues that WADL is in violation of the Commission's broadcast rules. Finally, CVI maintains that the original complaint should have been dismissed due to gross procedural inadequacies.

3. WADL states in its opposition that CVI's request for reconsideration is without merit and should be denied. WADL argues that the Bureau did not merely define a network affiliate as any station which broadcasts more than 15 hours of network programming. Rather, it continues, the Bureau's action took note of the entire relationship between WADL and CBS, as evidenced by CBS' letter confirming that there was no affiliation agreement, but merely a broadcast agreement which does not give WADL the right to carry CBS programming on a regular basis. Further, WADL maintains that even if it did carry more than 15 hours of network programming in any week, it would not automatically become a network affiliate as CVI suggests. A network affiliation, indicates WADL, assumes an ongoing relationship between a station and a network with the right or obligation to carry programming on a regular basis, something WADL does not have. In any event, WADL points out that it has carried only 7 1/2 hours of network programming since September 18, 1993, and has never carried more than 15 hours of network programming in any one week.[6] Finally, WADL avers that the procedural arguments raised by CVI are without factual or legal basis. WADL notes that CVI denied its request for carriage on April 30, 1993. Since §76.7(c)(4) (iii)(A) of the Commission's Rules requires that a complaint be filed within sixty days of a cable system's denial of carriage, WADL contends that its June 15, 1993, complaint was timely filed.

4. In its reply to the opposition, CVI argues that WADL has repeatedly represented to the Commission that no written agreement between it and CBS exists. However, CVI has submitted a copy of a broadcast agreement WADL has with CBS which clearly indicates that the station is an alternate affiliate. This evidence, along with the miscounted hours of programming proves that WADL is a CBS affiliate. Despite the fact that CVI feels that the Bureau's order to carry WADL was in error, CVI states that it did in fact commence carriage of WADL on January 9, 1994, as required.[7] It argues, however, that this does not moot the question of whether it had any carriage obligations toward WADL on June 2, 1993, and it requests that the Commission address this matter as it is the central issue in the $4 million lawsuit filed by WADL. In addition, CVI states that the Commission should "set the record straight and sanction WADL for its lack of candor and improper conduct." CVI insists that if WADL had waited the full 30-days to file its complaint, as mandated by Congress and the Commission's rules, the issue of carriage would likely have been amicably resolved.

5. Having reviewed the pleadings before us, we continue to believe that WADL is entitled to carriage on the Cablevision Industries cable system in Dearborn, Michigan, under the mandatory broadcast signal carriage rules and accordingly the CVI petition for reconsideration will be

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[1] After a conversation with counsel for petitioner, it was determined that although this petition was entitled "Application for Review", it should be treated as a "Petition for Reconsideration."

[2] A "Petition for Stay" was filed concurrently with this petition requesting that the Commission stay the effective date of its decision until it acts on CVI's reconsideration request. However, since that date has now passed and CVI has indicated in a later pleading that it commenced carriage of WADL as required, we see no need to discuss its merits or those of any subsequent related filings. Therefore, pursuant to delegated authority, the petition for stay is dismissed.

[3] Adell Broadcasting Corporation against Cablevision Industries, DA 93-1386, 8 FCC Rcd 8232 (1993).

[4] Letter from Robert D. Shellard, Director of Planning and Administration from CBS' office of Affiliate Relations.

[5] Section 76.55(f) defines a network station as one that offers network programming on a regular basis for 15 or more hours per week.

[6] Statement of James Panagos, Program Director for WADL.

[7] CVI states that it never flatly denied carriage to WADL, despite its assertions. Instead, CVI maintains that it said it would monitor the station's programming in order to see if it complied with the must-carry regulations. Since, as it turns out, WADL has stated that the program log submitted with its original complaint was inaccurate, CVI feels that its desire to monitor was well-founded.

denied. The statute and rules do not require a cable operator to carry more than a single affiliate of a network and it is this provision that CVI principally relied on to excuse its failure to carry WADL on June 2, 1993. The rule in question (§76.56(b)(5)) provides as follows:

> (5) A cable operator is not required to carry . . . the signals of more than one local commercial television station affiliated with a particular broadcast network .

WADL has an arrangement with CBS pursuant to which it takes certain programs from the CBS network. It is, however, a secondary or alternate affiliate of CBS, which means that it has the option of carrying programs offered to it by CBS that are not broadcast by the primary affiliate in the market.

6. The question presented is whether this arrangement makes WADL an "affiliate" within the meaning of the rules. "Affiliated with" is not terminology specifically defined in the mandatory carriage rules. Guidance on answering this question can, however, be taken from other portions of the Commission's Rules and from an analysis of the structure and objectives of the Act which provides this exemption. Thus, for example, §§73.658(l) (l) (iii) and (iv) of the broadcast rules,[8] define the affiliation concepts that we believe are intended to be covered by this exemption. They provide as follows:

> (iii) *Affiliated station* means a station having a regular affiliation . . . under which it serves as that network's primary outlet for the presentation of its programs in a market. It includes any arrangement under which the network looks primarily to this station rather than other stations for the presentation of its programs and the station chiefly presents the programs of this network rather than another network.
>
> (v) *Unaffiliated station* means a station not having an affiliation agreement as defined in this subparagraph with a national television network, even though it may have other types of agreements or per-program arrangements with it.

Based on these definitions and the apparent objective of the statutory exemption provision to relieve cable system operators of the obligation to carry two affiliates of the same network broadcasting the same network programming, we cannot conclude that the WADL agreement with CBS made it an "affiliate" for purposes of this exemption.[9]

7. CVI urges, however, that whatever the ultimate merits of the above issue, it was not under the mandatory carriage obligations in question on June 2, 1993, the general date on which the initial carriage obligations under the rules took effect. In this regard, CVI urges reconsideration at least in part by reference to a variety of incomplete or misleading information provided by WADL and relied on by the Commission. It notes for example that WADL incorrectly stated that it had no written agreement with CBS,[10] that WADL provided incorrect information as to the amount of CBS programming actually to be broadcast,[11] that WADL's letterhead contained on it the CBS "eye" logo and made reference to its being a CBS affiliate,[12] that WADL had been a "home shopping" station based on *TV Guide* listings shortly prior to June 2, and that such stations had no must-carry rights at that time and that there was no assurance that the transition out of that category was complete. Having determined that the signal of WADL is now entitled to carriage and is in fact being carried, we do not find it neessary or desirable in this proceeding to attempt to answer the issues raised by the above contentions and that are in issue in the pending lawsuit, the substance and scope of which has not been revealed to the Commission. At the conclusion of the process provided for in the rules, no penalty has been assessed against CVI for failing to carry WADL prior to January 9, 1994 (when carriage is stated to have commenced) and we have concluded that WADL is entitled to carriage and is being carried. That is all that we believe is required here.

8. In light of the above, therefore, pursuant to authority delegated pursuant to §0.321 and §1.106 of the Commission's Rules, the application for reconsideration, filed December 28, 1993, is denied.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

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[8] The broadast rules, which relate to the broadcast of programs of more than one network, unlike the cable rules in question, apply only to "the three national television networks." That distinction is not relevant for present purposes.

[9] It should be noted, however, that no such distinction between primary and secondary affiliates is made in the rules requiring the filing of affiliation contracts with the Commission. See §73.3613. The contract here in question thus should be filed with the Commission as are other contracts of this type by stations functioning in the same fashion as WADL.

[10] A statement of Franklin Adell, President of WADL attached to the station's August 4, 1993, "Reply to Opposition to Must Carry Complaint" states "Station WADL-TV is an "alternate affiliate" of CBS. As such it has no written agreement with the network . . . ." CVI subsequently filed a copy of a written agreement between CBS and Adell Broadcasting pertaining to the carriage of network programs by the station. WADL does not dispute that in fact such an agreement exists.

[11] Mr. James Panagos, Program Director of Station WADL, in a December 12, 1993 statement indicates that a program schedule provided by CVI "is incorrect."

[12] A letter from WADL to CVI dated June 1, 1993 is on station stationary that contains the CBS eye logo and the statement "A CBS Alternate Affiliate." This letter was attached to the initial WADL complaint. The actual agreement between CBS and WADL provides that WADL "shall neither hold itself out as a station affiliated with CBS Television Network nor make any use whatsoever of the eye symbol trademark or any other CBS identification, except to broadcast them insofar as they are part of Network Programs broadcast by Station pursuant to this Agreement." (Agreement at page 6).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-41

In the Matter of

Amendment of Section 73.202(b), RM-8443
Table of Allotments,
FM Broadcast Stations.
(Cordova, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1994; Released: May 31, 1994

Comment Date: July 22, 1994
Reply Comment Date: August 1, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of New Century Radio, Inc. ("NCRI") ("petitioner"), licensee of Station WFFN(FM), Cordova, Alabama,[1] seeking the substitution of Channel 237A for Channel 223A at Cordova and modification of its authorization accordingly.

BACKGROUND

2. Petitioner is presently licensed to operate Station WFFN(FM) as a 6 kilowatt facility on Channel 237A at Cordova pursuant to the provisions of Section 73.215 of the Commission's Rules at coordinates 33-50-42 and 87-18-26. Petitioner previously requested modification of its license to specify operation on Channel 254C3 or Channel 254A at Cordova but was modified to Channel 223A at a restricted site, in the context of a comparative proceeding in MM Docket No. 90-476 to accommodate its desire to expand its coverage area. *See* 7 FCC Rcd 5489 (1992).[2] Petitioner states that Channel 223A requires a relocation of its transmitter site to an area at least 9 kilometers (5.6 miles) south of Cordova to comply with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. Petitioner states that the site restriction placed on Channel 223A at Cordova would remove it from its core market and would result in the loss of a second and third city grade signal to 21,604 persons. Moreover, petitioner advises that its relocation on Channel 223A would deliver Station WFFN(FM)'s signal to areas presently well served by signals in the Birmingham area. Specifically, petitioner states that operation of Station WFFN(FM) on Channel 223A would result in the provision of a ninth 70 dBu service to approximately 26,480 people, a second city grade service to approximately 65 people in an area comprising less than one square kilometer; and a third 70 dBu signal to approximately 566 people in an area of 14.4 square kilometers. If permitted to remain on Channel 237A, petitioner asserts that Station WFFN(FM) would provide a second 70 dBu signal to 7,384 people in an area of 118.3 square kilometers, as well as a third city grade signal to 14,220 people in an area of 134.4 square kilometers.

3. We believe the public interest would be served by proposing the substitution of Channel 237A for Channel 223A at Cordova since it would enable Station WFFN(FM) to expand its coverage area. Therefore, we propose to modify petitioner's license for Station WFFN(FM) to specify operation on Channel 237A, as requested.

Technical Statement

4. Channel 237A can be allotted to Cordova at the petitioner's specified site at coordinates 33-49-01 and 87-11-55 consistent with the technical requirements of the Commission's Rules.[3]

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Cordova, Alabama, as follows:

	Channel No.	
City	Present	Proposed
Cordova, Alabama	223A	237A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **July 22, 1994**, and reply comments on or before **August 1, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Fed-

[1] An application (File No. BALH-930903GO) for assignment of license from Radio South, Inc. ("RSI") to New Century Radio, Inc. was granted September 27, 1993. According to petitioner, Mr. Houston L. Pearce is the majority stockholder of both RSI and NCRI.

[2] Petitioner filed a petition for reconsideration of the Commission's action in MM Docket No. 90-476, but subsequently withdrew its request pursuant to a settlement agreement with North Jefferson Broadcasting Company, Inc., permittee of Channel 254A, Warrior, Alabama. *See* 8 FCC Rcd 7087 (1993).

[3] The requested allotment of Channel 237A at Cordova is short-spaced to the reference coordinates for Channel 238A at Holly Pond, as well as to the construction permit for Channel 238A at that community (File No. BPH-900122NT). However, the Holly Pond authorization already affords contour protection to Station WFFN(FM) on Channel 237A pursuant to the provisions of Section 73.215 of the Commission's Rules. While we have determined that issuance of this *Notice of Proposed Rule Making* is appropriate at this time, final action in this proceeding may be withheld until a license is issued to cover the construction permit on Channel 238A at Holly Pond. A copy of this *Notice* will be served on Good Earth Broadcasting, the permittee of Channel 238A at Holly Pond.

eral Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Erwin G. Krasnow, Esq.
Verner, Liipfert, Bernhard
McPherson and Hand
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005-2301

8. IT IS ORDERED, That a copy of this *Notice of Proposed Rule Making* be sent by Certified Mail, Return Receipt Requested, to the permittee for Channel 238A, Holly Pond, Alabama, as follows: Good Earth Broadcasting, Inc., P.O. Box 968, Cullman, AL 35056.

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-166

In the Matter of

Amendment of the Commission's Rules to
Establish Rules and Policies Pertaining
to a Mobile Satellite Service in the
1610-1626.5/2483.5-2500 MHz
Frequency Bands

ORDER

Adopted: May 18, 1994; Released: May 23, 1994

By the Chief, Domestic Facilities Division:

1. TRW, Inc. (TRW) has requested a two-week extension of time until June 20, 1994 in which to file reply comments in response to the *Notice of Proposed Rulemaking* in CC Docket No. 92-166 regarding the establishment of a mobile-satellite service (MSS) in the 1610-1626.5/2483.5-2500 MHz frequency bands (FCC 94-11, released Feb. 18, 1994). Comments to the *Notice* were filed on May 5, 1994; reply comments are due June 6, 1994. TRW is one of six pending applicants seeking authority to construct MSS systems in these bands. In its request, TRW represents that three other applicants, Constellation Communications, Inc. (Constellation), Ellipsat Corporation, and AMSC Subsidiary Corporation, support a filing extension. In fact, the day after the TRW request was filed, Constellation filed a separate request seeking a one-month extension of the reply comment deadline until July 6, 1994. (Constellation represents that TRW does not object to a 30-day extension.) The parties base their requests upon the volume and technical detail contained in the comments. They cite to over 1000 pages of comments, which include several hundred pages of technical appendices, and argue that an extension is warranted in order to provide the parties with a meaningful opportunity to review, analyze and respond to the pleadings. TRW further states that the extension would allow some additional time for the applicants to continue to try to reach a settlement. Constellation notes that comments in an interrelated proceeding (IC Docket No. 94-31 -- Notice of Inquiry in preparation for world radio conferences) are also due on June 6 and that this exacerbates the difficulty of preparing meaningful reply comments in response to the MSS *Notice*.

2. The extension requests are opposed by Motorola Satellite Communications, Inc. (Motorola) and Loral/Qualcomm Partnership, L.P., the two remaining MSS applicants in these frequency bands. Both argue that they are prepared to devote the necessary resources to preparing reply comments, that the issues raised in the comments are the same ones examined in detail during the Negotiated Rulemaking conducted prior to the issuance of the *Notice*, and that a further delay in this proceeding would be contrary to the public interest. Motorola also states that any attempt at a settlement among the applicants will be facilitated with a complete record.

3. We believe that a two-week extension of time in which to file reply comments is reasonable. This brief extension should not adversely affect the timing of a *Report and Order* in this proceeding and should lead to a higher quality record with respect to the many technical issues raised in the voluminous comments. While the general issues discussed in the comments are the same ones addressed in the negotiated rulemaking, the specific proposals presented in the comments represent new solutions and require a thorough analysis.

4. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, the date for filing reply comments in the above-captioned proceeding is extended until June 20, 1994.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY — AAD 94-57

Public Release of Information
Obtained during Joint Audit

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1994; **Released: May 19, 1994**

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we release to the public certain financial information obtained jointly by Commission and state regulatory agency auditors during a joint federal/state audit of Southwestern Bell Telephone Company's ("SWBT's") transactions with its affiliates. The information to be released is contained in the Joint Audit Report package prepared by the joint audit team at the audit's conclusion. Pursuant to Section 220(f) of the Communications Act of 1934, as amended,[1] we release this Joint Audit Report package to the public. Although this will disclose information the joint audit team obtained from SWBT, we emphasize that we are not adopting the Joint Audit Report package or endorsing the analysis and conclusions in it.

II. BACKGROUND

2. This was the first joint audit of Regional Bell Operating Company ("RBOC") affiliates in which the audit team was staffed by Commission auditors and by auditors from the regulatory agencies in all the states (Arkansas, Kansas, Missouri, Oklahoma and Texas) having jurisdiction over the RBOC's local telephone services. The audit examined transactions between SWBT and its affiliates occurring from 1989 to 1992. The audit team's objective was to determine compliance with the Commission's affiliate transactions rules, as codified in 47 C.F.R. § 32.27,[2] which prescribes federal accounting requirements for recording transactions between regulated carriers and their nonregulated affiliates on the carriers' regulated books of account. The auditors also evaluated whether telephone ratepayers had been adversely affected by potential cross-subsidies flowing to nonregulated affiliates as a result of noncompliance with these rules.

3. At the audit's conclusion, the audit team prepared a Joint Audit Report package that contains the following: (1) a Preface; (2) a letter from SWBT; (3) an Executive Summary; (4) the Joint Audit Report; (5) SWBT's Comments on the Joint Audit Report; and (6) the audit team's Reply Comments. SWBT makes no confidentiality or proprietary claims for the information contained in this package.[3] The Joint Audit Report and Reply Comments provide the audit team's final conclusions regarding the audit.

III. DISCUSSION

4. Section 220(f) of the Communications Act prohibits Commission personnel from disclosing publicly facts and information obtained during an audit, absent a Commission or court order. This Commission does not routinely publicly release audit reports prepared by Commission staff.[4] Under the circumstances of this joint audit, however, we believe that it is in the public interest to disclose to the public the Joint Audit Report package. The Joint Audit Report and Reply Comments within that package set forth the audit team's final conclusions regarding the first joint audit of RBOC affiliates that included all state commissions having jurisdiction. Publication of those conclusions will enable the public to learn about the joint audit process and its inherent benefits, which we believe are substantial. By combining the expertise of federal and state agencies, joint audits enable both this Commission and the state commissions to use their auditing resources more effectively. Joint audits can also ensure that this Commission and the states act consistently in the pursuit of common goals and ideals. For example, here, the joint audit team reviewed SWBT's accounting for affiliate transactions. This is a matter of mutual federal-state concern that could become the subject of further investigations or other actions by this Commission and its state counterparts. Lastly, disclosure will alert interested persons, including customers, to the audit team's conclusions and thus promote further scrutiny to the benefit of ratepayers and the public. Accordingly, we disclose to the public the Joint Audit Report package.

5. We emphasize that in disclosing this information, we are not adopting any portion of the package or endorsing any of the analysis or conclusions contained in it. We, however, direct the Common Carrier Bureau to complete its review of the Joint Audit Report promptly and to prepare its recommendations regarding any possible further actions based on the Report within 90 days.

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. § 220(f), that WE HEREBY DISCLOSE to the public certain financial information obtained during the joint audit of Southwestern Bell Telephone Company and its affiliates.

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[1] 47 U.S.C. § 220(f).

[2] 47 C.F.R. § 32.27.

[3] *See* Letter from Richard Hartgrove, General Attorney for SWBT, to FCC (May 3, 1994).

[4] *See* National Exchange Carrier Ass'n, Request for Confidential Treatment of Certain Financial Information, *Memorandum Opinion and Order*, 5 FCC Rcd 7184, 7185, n.15 (1990) (Commission's general policy is to preserve confidential status of audit reports); Martha H. Platt, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 5742, 5743, n.8 (1990) (same).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — AAD 93-18

Petition for Waiver of the Commission's Depreciation Methods and Procedures

ORDER

Adopted: May 24, 1994; Released: May 31, 1994

By the Chief, Accounting and Audits Division, Common Carrier Bureau:

1. On January 27, 1993, the American Telephone and Telegraph Company (AT&T) filed a petition to waive application of the Commission's depreciation methods and procedures to permit AT&T to compute and record its regulated depreciation expenses in conformity with depreciation rates it uses for financial reporting purposes. A pleading cycle was established for this petition, and comments and reply comments were filed.[1]

2. On September 23, 1993, the Commission streamlined its depreciation prescription procedures.[2] Because of this action, AT&T in a letter dated March 1, 1994, stated that the relief requested in its petition for waiver is no longer necessary and asked permission to withdraw its waiver request without prejudice. We find that AT&T's request is in the public interest.

3. Accordingly, IT IS ORDERED that the petition for waiver filed by AT&T on January 27, 1993, for permission to compute and record depreciation expenses for regulatory purposes in conformity with the depreciation rates used for financial reporting purposes IS DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

[1] American Telephone and Telegraph Company Files Petition for Waiver of the Commission's Depreciation Methods and Procedures, *Public Notice*, 8 FCC Rcd 915 (1993).

[2] Simplification of the Depreciation Prescription Process, *Report and Order*, 8 FCC Rcd 8025 (1993) (*Depreciation Simplification Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of File No. ISP-93-001-ND
fONOROLA Corporation
for Modification of Regulatory Status
from Dominant to Non-Dominant

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 1994; Released: May 31, 1994

By the Acting Chief, Common Carrier Bureau:

1. fONOROLA Corporation (fONOROLA) has filed a petition for modification of its regulatory classification from dominant to nondominant for the provision of its authorized switched services through the resale of private lines between the United States and Canada. We currently authorize fONOROLA to provide international message telephone service (IMTS), facsimile and data service between the United States and Canada through the resale of U.S. international private lines.[1] fONOROLA has been subject to dominant carrier status for the provision of its authorized U.S. international services because it is wholly-owned by fONOROLA, Inc., a Canadian telecommunications entity.[2] fONOROLA filed this petition pursuant to the Commission's Order in *Regulation of International Common Carrier Services*, 7 FCC Rcd 7331 (1992) (*International Services*), *errata*, DA 93-26, released January 19, 1993, and Section 63.13 of the Commission's Rules, 47 C.F.R. § 63.13. American Telephone and Telegraph Company (AT&T) filed an opposition. For the reasons set forth below, we grant fONOROLA'S application.

BACKGROUND

2. The Commission imposed dominant carrier status on all "foreign-owned" U.S. carriers in their provision of all international services to foreign markets in *International Competitive Carrier*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986). It defined "foreign-owned" as any U.S. carrier that is over fifteen percent directly or indirectly owned by a foreign telecommunications entity or on whose board of directors a representative of a foreign telecommunications entity sits. *Id.* at 842 n.74.

3. In its *International Services* decision, the Commission found this policy overbroad and unnecessarily burdensome. The Commission therefore decided to regulate a U.S. international carrier, whether U.S. or foreign-owned, as dominant only on those routes where a "foreign affiliate" of the carrier has the ability to discriminate against unaffiliated U.S. carriers in the provision of services or facilities used to terminate U.S. international traffic in the destination market.[3] 7 FCC Rcd at 7332. The Commission revised Section 63.01(r) of its rules to require each applicant for international Section 214 authority to certify whether it has an affiliation with a foreign carrier. A U.S. carrier is an "affiliate" of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. 7 FCC Rcd at 7332-33.

4. For purposes of classifying a U.S. carrier as dominant or nondominant on a particular route, the Commission established the following presumptions: (1) a carrier that has no affiliate on the foreign end is presumed nondominant; (2) a carrier that has an affiliate on the foreign end that is a monopoly is presumed dominant; and (3) a carrier that is affiliated on the foreign end with a carrier that is not a monopoly bears the burden of submitting information sufficient to demonstrate that its foreign affiliate is unable to discriminate against unaffiliated U.S. carriers through control of bottleneck facilities in the destination country. 7 FCC Rcd at 7334; 47 C.F.R. § 63.10 (a)(1)-(3). The Commission further determined in *International Services* that all U.S. international carriers that merely resell the switched services (including IMTS) of other U.S. carriers on a particular route would be presumed nondominant without regard to any foreign affiliations. 7 FCC Rcd at 7335; 47 C.F.R. § 63.10 (a)(4).

5. In seeking to modify its regulatory status from dominant to nondominant on the U.S.-Canada route, fONOROLA states that it is a wholly-owned subsidiary of fONOROLA, Inc., a Canadian company whose primary business is providing telecommunications services in Canada. Thus, fONOROLA acknowledges that it has an affiliation with a Canadian carrier and that it therefore does not qualify for a presumption of nondominance. *see* 47 C.F.R. § 63.10 (a)(3). fONOROLA certifies, however, that neither it nor its affiliate owns or controls any telecommunications facilities in Canada. fONOROLA App. at 4; fONOROLA Certification at para. 5. fONOROLA further states that it is unable to discriminate against unaffiliated U.S. carriers in the provision of service to Canada because fONOROLA, Inc., its affiliate, is one of over eighty (80) resellers in Canada. fONOROLA App. at 5.

6. AT&T contends that the fONOROLA application should be denied unless the Commission imposes the reporting requirements that AT&T proposed in its petition for reconsideration of the *fONOROLA Order*. That order permitted fONOROLA to provide switched services between the United States and Canada via resold private lines. In its Petition for Reconsideration, AT&T contends that fONOROLA does not provide any northbound service to Canada, despite its authorization to provide two-way service between the United States and Canada. According to AT&T, in order to ascertain whether the net settlements outpayment to Canada will increase as a result of the interconnection of private lines between the United States

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[1] *See* fONOROLA, 7 FCC Rcd 7312 (1992) (*fONOROLA Order*).

[2] As a dominant carrier, fONOROLA must obtain Commission approval before adding circuits; file cost support with tariff filings; file tariffs on 45 days' notice; and file country specific traffic and revenue reports on a quarterly, rather than annual, basis.

[3] This change in policy did not modify the dominant carrier status for the provision of certain international services of AT&T, Comsat, or U.S. carriers that provide international service to non-contiguous domestic points. 7 FCC Rcd at 7342 n.2.

and Canada, the Commission should require fONOROLA to provide detailed monthly reports of its billed minutes, and the Commission should place those reports on public notice. AT&T Petition to Deny at 5. Additionally, AT&T states that the Commission should indicate its intention to take immediate steps to protect U.S. ratepayers from any increase in net settlements caused by the diversion of southbound traffic to international private lines. *Id.* at 5-6. fONOROLA responds that AT&T fails to address fONOROLA's qualifications for nondominant status, and instead merely reiterates its request for reconsideration of the Commission's decision in the *fONOROLA Order*.

DISCUSSION

7. We grant fONOROLA's request for change of status from dominant to nondominant for the provision of its authorized switched services through the resale of private lines between the United States and Canada. We note that fONOROLA serves the U.S.-Canada route solely through the resale of international private line services provided by U.S. facilities-based carriers. Neither fONOROLA nor its Canadian resale affiliate owns or controls any telecommunications facilities in Canada, as defined in Section 63.01(r)(5) of the Commission's Rules.[4] The Commission stated in *International Services* that "there appears to be no substantial risk of discrimination against unaffiliated U.S. carriers where the foreign carrier-affiliate does not own any telecommunications facilities in the foreign market." 7 FCC Rcd at 7343 n.41. We find nothing in this record that suggests that a different conclusion is warranted here. Under these circumstances, grant of nondominant status to fONOROLA is consistent with the Commission's decision in *International Services, id.* at 7337. AT&T's principal contention has already been addressed by the Commission on reconsideration of its decision in the *fONOROLA Order*.[5] Specifically, the Commission rejected AT&T's reporting requirements as proposed. However, the Commission concluded that it would require nondominant international private line resellers providing switched or interconnected private line services to file semi-annual traffic reports for the first three calendar years following an equivalency determination.[6] In view of the fact that fONOROLA is herein reclassified as a nondominant carrier and, pursuant to the general policy established in the Commission's decision on reconsideration of the *fONOROLA Order*, fONOROLA is subject to the requirement to file with the Commission semi-annual traffic reports for traffic handled through December 1995.

ORDERING CLAUSES

8. Upon consideration of the application and review of the foregoing, IT IS HEREBY ORDERED THAT application File No. ISP-93-001-ND is GRANTED, and fONOROLA is authorized to resell international private lines for the provision of IMTS, facsimile and data service between the United States and Canada as a nondominant international carrier.

9. IT IS FURTHER ORDERED that fONOROLA, as a nondominant international private line reseller, shall file on a semi-annual basis with the Commission the information contained in the annual traffic reports filed pursuant to Section 43.61 of the Commission's Rules for traffic through December 1995.

10. IT IS FURTHER ORDERED that the Petition To Deny filed by AT&T is DENIED.

11. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

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[4] *See* fONOROLA Certification at para. 5. Should fONOROLA acquire in the future ownership or control of any telecommunications facilities in Canada, it is required to notify the Commission pursuant to Section 63.13(a)(5) of the Rules. 47 C.F.R. § 63.13(a)(5).

[5] fONOROLA Corporation and EMI Communications Corporation, Order on Reconsideration, FCC Rcd (1994)(FCC 94-81). fONOROLA is required to file its quarterly traffic report for the first quarter of 1994 since during that quarter fONOROLA was still classified as dominant for the resale of private lines for the provision of its authorized switched services between the United States and Canada.

[6] *Id.* at para. 20, note 25-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Phillip D. Perry — File No. 53123-CM-MP-92
for Modification of
MMDS station WMH484
at Maui, Hawaii

MEMORANDUM OPINION AND ORDER

Adopted: May 23, 1994; Released: June 1, 1994

By the Chief, Domestic Facilities Division:

1. *Background.* On June 10, 1991, Phillip D. Perry (Perry) was granted a conditional license to construct and operate the above-referenced Multichannel Multipoint Distribution Service (MMDS) station (File No. 11821-CM-P-83). On June 1, 1992, Perry filed the above-referenced modification application, proposing a change of transmitter location.

2. *Petition to Deny.* Steven C. Bailey (Bailey) filed a petition to deny Perry's modification application, arguing that "approval of the proposed relocation of Perry's transmission facilities from the currently [colocated] authorized site... would cause harmful radio interference, contrary to the public interest, to Bailey's previously proposed MMDS facilities." Petition at 1-2. According to Bailey, Perry's modification application fails to satisfy the threshold interference requirements of Section 21.902 because the application concedes that grant of the modification application would cause harmful interference to 19.2 square miles of Bailey's protected service area.

3. *Opposition.* Perry argues in his opposition that Bailey lacks standing to file a petition to deny. As support for its statement that "an application is not restored to pending status by the filing of a petition for reconsideration," Perry cites *Houston Mobifone, Inc.*, 33 Rad. Reg. 2d 1015 (1975); *Paxton Community Antenna System*, 33 Rad. Reg. 2d 734 (1975); *Walker & Townsend, Inc.*, 11 Rad. Reg. 2d 701 (1967). Opposition at 3. Thus, "Bailey's reconsideration request [should] not preclude favorable action on Perry's modification application." *Id.* at 4. Perry admits that his analysis demonstrates harmful interference from the Perry station as modified inside Bailey's protected service area, but asserts that the modification should be granted because the area receiving harmful interference is small.

4. According to Perry, "Bailey is correct to note that Section 21.902 of the FCC's rules requires Perry to demonstrate interference protection to previously authorized or proposed adjacent channel stations. Where Bailey errs is in his assumption that his E-group application still falls within this category, [i]nasmuch as Bailey does not have an application pending for Maui...." Opposition at 4-5. Further argument is also presented in the opposition concerning the availability of Perry's transmitter site. "Bailey's claim that he has never had exclusive rights to Perry's original transmitter site and that Pacific Satellite ("Pacific"), the purported sublessee of the site, remains willing to sublease space to Perry is untrue." Opposition at 6. "[T]he Commission [should] dismiss Bailey's assertion that the Pacific site remains available to Perry, as it is based on blatant misrepresentations as to the authority of Pacific and Bailey to use the site." Opposition at 9. Bailey asserts that "Perry now urges that its patently defective modification application be exempted from those [interference-protection] requirements" due to "faulty allegations" Perry makes about the loss of Perry's authorized transmitter site. Bailey's Petition at 2-3. "These representations that Bailey has secured an exclusive lease arrangement for the tower are simply untrue. As confirmed by the attached declarations, the terms of Bailey's agreement with Pacific Satellite do not give him any rights which would exclude colocation of the E-group and F-group facilities." Bailey's Petition at 3. "In view of Perry's allegations, Bailey has asked Pacific Satellite whether it remains willing to sublease tower space to both Bailey and Perry. Bailey has been provided assurance by Pacific Satellite that it will sublease space to Perry as well as Bailey and that it has so advised Perry. *Id.* at 4. Bailey concludes that Perry's modification application "is in patent violation of the rules and should be dismissed or denied." *Id.*

5. *Reply.* Bailey argues in rebuttal that Perry "declines to provide the Commission with any supporting facts, much less any proof that Perry made diligent efforts to build at the authorized site." Reply at 2. Bailey asserts he "worked cooperatively to obtain a joint-use site." *Id.* "Carroll further states that at no time during the September 3 to June 1 period did Perry, as claimed, ask that Pacific Satellite allow him to construct at the authorized site and Pacific Satellite did not refuse to allow Perry to use that site." *Id.* at 3. "When they spoke in November [of 1991], Carroll confirmed to Perry that he had secured a lease agreement with the site owner." *Id.* at 3, n.2. "Of course, Perry's argument is inconsistent with his alleged negotiations with Pacific Satellite for use of the site from September 1991 to June 1, 1992." *Id.* at 4.

6. With regard to Perry's standing challenge, Bailey states that Perry's "argument is fatally flawed because it ignores that MMDS conditional licensees have a high hurdle to justify a failure to construct in a timely fashion and, more important, that the Bureau cannot ignore material questions of fact regarding significant representations made in applications on which it must rule." *Id.* at 4. "Perry in particular knows full well that sites in the Haleakala National Park are no longer available. He justified relocation to the site specified in his current authorization on that ground, as well as on the benefits of colocating at the current site." *Id.* at 4. "Thus, even if the Bureau were able to find that Perry has accurately represented facts to the Commission and that the site is in fact no longer available as claimed, any modification of the authorization should be conditioned on the F-group carrying out the commitment of noninterference with an adjacent-channel MMDS facility operated at the currently authorized site (not sites at Haleakala National Park that are no longer available to applicants)." *Id.* at 4-5.

7. *Discussion.* Section 309 (d)(1) of the Communication's Act and Section 21.30 of the Commission's Rules require that a person filing a petition to deny demonstrate it is a "party in interest." Bailey alleges in his petition a distinct and palpable, direct inquiry in fact to Bailey's interests (harmful interference to Bailey's protected service area) if Perry's modification application were to be granted. *See U.S. v. Students Challenging Regulatory Agency Procedures,*

412 U.S. 669, 687 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Natl. Broadcasting Co.*, 37 F.C.C. 2d 897,898 (1972). We stated in *Lawrence N. Brandt and Krisar, Inc.*, 3 FCC Rcd 4082 (Dom. Fac. Div. 1988) (in that case in which the claim to standing failed), it was "significant here that [the petitioner] has not alleged that it has or will have any radio facilities for which there is a potential for harmful electrical interference which would be affected by the change of location of the two MMDS stations." *Id.* at 4083, n.5. Thus, Bailey's allegation of potential harmful interference is sufficient to qualify Bailey as a party in interest eligible to file a petition to deny pursuant to Section 309 and Section 21.30.

8. *Interference.* Section 21.902(c)(2) requires that Perry file with his application an "analysis of the potential for harmful interference with any authorized or previously proposed station(s), if the proposed transmitting antenna has an unobstructed electrical path to any part of the protected service area of any other station(s) that utilizes, or would utilize, an adjacent channel frequency." A number of issues are undisputed: (1) Perry's modification application proposes a transmitting antenna with an unobstructed electrical path to parts of the protected service area of Bailey's previously-proposed and adjacent-channel station; (2) Perry filed an analysis of the potential for harmful interference to Bailey's protected service area; and (3) Perry's analysis demonstrates that harmful interference, as defined at Section 21.902(f), would be present within Bailey's protected service area if Perry's modification application is granted. By its terms, Section 21.902(f) specifically is an entitlement to protection for the *entire* area within the boundaries of the protected service area. In addition, Section 21.902(a) requires Perry to "make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city." Section 21.902(b)(4) states that "[a]s a condition for use of frequency in this service," Perry is required to engineer his station for adjacent channel operation and to insure that the ratio of Perry's signal to Bailey's signal is less than O dB "anywhere within [Bailey's] protected service area."[1]

9. However, at the time Perry's modification application was filed, Bailey's application had already been dismissed.[2] Thus, there was no duty for Perry to file an interference analysis for a station proposed in an application which was dismissed on the day Perry filed his modification application, and which was not subsequently reinstated. *See* 47 C.F.R. Secs. 21.902(c) and (e). In light of these considerations, we find Bailey's arguments insufficient to establish the existence of violations of Sections 21.902(a),(b) (4), (d), (e) or (f). *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir.1988); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (hereinafter cited as *Jazz*); *see also Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987); *Heritage Broadcasting Co. of North Carolina*, 1 FCC Rcd 1012 (Comm. Car. Bur. 1986); *Thomas Glab*, 5 FCC Rcd 516 (Dom. Fac. Div. 1990); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Having carefully considered all of the pleadings and evidence submitted by the parties, we find that the allegations raised by Bailey, when read in conjunction with the entire record, are insufficient to raise a substantial and material question of fact. *See Jazz*, 775 F.2d at 394.

10. *Conclusion.* Accordingly, IT IS ORDERED that the petition to deny filed by Steven C. Bailey concerning the above-referenced modification application filed by Phillip D. Perry IS DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4, 1.106 and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] Much discussion in each of the pleadings concerns Perry's assertion, in his modification application that his authorized transmitter site was no longer available. However, MMDS change-of-location modification applications, such as Perry's, are not restricted to situations in which there is a loss of site availability. Here we are considering a modification application. We are not considering Perry's extension application, for which the loss of site availability is a consideration. Section 21.40(b) prohibits grant of an extension application when there is a loss of site availability. The modification rules of Part 21 do not have the same issue for consideration. MDS modification application processing rules do not require Perry to demonstrate that Bailey obtained exclusive lease rights at the tower Perry previously-proposed. MDS modification applications which are proposed for other reasons have been processed and granted. Perry's modification application states that "Perry has agreed to lease his channels to Maui Cablevision Corp.("MCC"), a wireless cable operator presently developing a wireless cable system to serve Maui. MCC has entered into lease agreements with various MDS and ITFS applications and licensees." Modification Application, Exhibit K at 2. A change-of-location modification application is often filed for purposes of colocation with Instructional Television Fixed Service stations, the adjacent-channel MMDS station, or single-channel MDS stations to be employed in the same wireless cable system. In this instance, there was independent grounds for processing the modification application. Thus, it is not necessary for us to reach the issue of whether any of Bailey's actions excluded Perry from his previously-proposed tower site or the issue of whether Perry's correctly represented the site availability situation in his modification application. It is not necessary for Bailey to demonstrate in his petition to deny that he did not "enter into lease or contract or otherwise take any action that would unreasonably prohibit location of another station's transmitting antenna at any given site" as prohibited by Section 21.902(b)(1). And for this reason, we will not initiate "a full FCC investigation into this matter" as requested by Perry.

[2] After the filing of the petition, opposition and reply herein, the dismissal of Bailey's application was upheld on reconsideration. *Steven C. Bailey*, 8 FCC Rcd 7252 (Dom. Fac. Div. 1993). An Application for Review was filed but was subsequently dismissed at Bailey's request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hart Telephone Company File No. 316ms0028

Notice of Apparent Liability for Forfeiture
Penalty for Station KNKB248 in the Public
Land Mobile Service at Hartwell, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1994; Released: June 1, 1994

By the Chief, Mobile Services Division:

1. Hart Telephone Company (Hart) has filed a Request for Reduction of the "Notice of Apparent Liability for Forfeiture" issued by the Chief, Mobile Services Division (MSD) for $10,000. *Hart Telephone Company*, 8 FCC Rcd 7254 (Mobile Serv. Div. 1993) (NALF). For the reasons discussed below, the request is granted in part.

2. On February 26, 1987, the Commission granted an authorization to Hart to operate on frequency 152.84 MHz at Hartwell, Georgia. The expiration date of the authorization was February 26, 1988. On October 26, 1992, Hart filed FCC Form 489, Notification of Status of Facilities, notifying the Commission that construction had been completed in accordance with the authorization.

3. In the NALF, the MSD found that because Hart commenced operation without filing FCC Form 489 in a timely manner, it was in apparent violation of Section 22.9(b)(1) of the Commission's Rules, and that Hart's failure to file the FCC Form 489 until October 26, 1992, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act. Moreover, the MSD stated that pursuant to the Commission's *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *petition for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed Aug. 23, 1992) (*Forfeiture Policy Statement*), the base forfeiture amount for failing to file required forms was $20,000, but that the forfeiture was being adjusted downward by $10,000 because the violation is a relatively minor one. As a result, the MSD assessed a $10,000 forfeiture.

4. Hart claims that two additional factors apply pursuant to the *Forfeiture Policy Statement* which require downward adjustment of the forfeiture but which were not taken into account by the NALF. Hart contends that it previously was not found in violation of the Commission's Rules and, thus, the "history of compliance" with the Commission's Rules criterion is present. Hart also contends that the "good faith/voluntary disclosure" criterion applies. In support, Hart states that its investigation of the failure to file Form 489 was prompted by the Commission's proposed deletion of the underlying modification authorization[1] and upon its discovery of the failure to file Form 489. Hart promptly disclosed the fact to the Commission and acted in good faith in so doing. Hart adds that the disclosure was entirely voluntarily and was accompanied by an application for reinstatement of the authorization and a request for special temporary authority (STA) filed October 27, 1992.

5. There is no dispute that Hart failed to timely file a FCC Form 489. We accept Hart's contention that the forfeiture should be adjusted downward for its "history of overall compliance" because Commission files do not contradict Hart's assertion of such history prior to issuance of the NALF. We reject, however, Hart's claim that voluntary disclosure also warrants a downward adjustment of the forfeiture. While Hart voluntarily filed its STA request and application for reinstatement, those filings stem from Hart's discovery after the Public Notice proposed deletion of Hart's authorization. Therefore, it was the Commission that first discovered Hart's failure to file the Form 489 and the discovery was done before Hart filed its requests for reinstatement and STA. As a result, Hart cannot be deemed to have voluntarily disclosed its violation. *See Teton Communications Incorporated*, 7 FCC Rcd 1989 (1992), *petition for reconsideration granted in part*, 8 FCC Rcd 591 (1993), *further petition for reconsideration pending* (filed Feb. 24, 1993) (rejected similar voluntary disclosure argument in an analogous situation).

6. In light of our accepting Hart's "history of compliance" argument but our rejecting Hart's "voluntary disclosure" argument, we reduce the forfeiture from $10,000 to $6,000.

7. Accordingly, IT IS ORDERED that the Request for Reduction filed by Hart Telephone Company in the captioned proceeding IS GRANTED TO THE EXTENT INDICATED ABOVE.

8. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. § 1.80(f)(4), that Hart Telephone Company SHALL FORFEIT to the United States the sum of six thousand dollars ($6,000) for violation of Section 22.9(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communication Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

9. IT IS FURTHER ORDERED that if the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. § 504(a).

10. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Hart Telephone Company, 202 N. Forest Ave., Hartwell, Georgia 30643, by Certified Mail, Return Receipt Requested.

[1] *See* Public Notice, Mimeo No. 30013, released Oct. 2, 1992 (Public Notice), at 4; and Notice of Expired Authorization sent to Hart from the Chief, MSD (Sept. 29, 1992). (Hart incorrectly cites these documents as being released and sent, respectively, in 1993.)

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Kings Telephone Company File No. 316ms0021

Notice of Apparent Liability for Forfeiture Penalty in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A, in the California 12- Kings Rural Service Area

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 24, 1994; Released: June 1, 1994

By the Chief, Mobile Services Division:

1. On February 6, 1990, the Commission granted Kings Telephone Company (Kings) an initial authorization for a single cell site located at Lemoore, California.[1] On July 15, 1991, Kings began providing commercial service from its system, utilizing a temporary cell site at Lemoore and filed a FCC Form 489 in a timely manner. On January 21, 1993, the temporary cell site was dismantled and two permanent cell sites which were authorized in November 1990, became operational. Nevertheless, Kings did not file the FCC Form 489 notifying the Commission of completion of construction of those cells and implementation of commercial service until June 15, 1993. In a letter to the Commission filed January 13, 1994, Kings voluntarily disclosed that the untimely filing was due to an administrative oversight. On January 29, 1994, Kings filed a request for Special Temporary Authority, which was granted on February 8, 1994.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Kings commenced operation without timely filing the FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1) of the Commission's Rules.

3. Section 503(b) of the Communications Act, 47 U.S.C. § 503, states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that Kings' failure to file an FCC Form 489 until June 15, 1993, constitutes willful and repeated conduct within the terms of the statute because Kings consciously and deliberately began operating the permanent cells without concurrently filing the FCC Form 489.[2]

4. Pursuant to the Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6295 (1993), the base forfeiture amount for failing to file required forms is $20,000. The forfeiture is being adjusted downward by $10,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $6,000 because Kings voluntarily disclosed its failure to file the FCC Form 489. Because, however, Kings failed to timely file for two cells, we are doubling the forfeiture. Consequently, a $8,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Kings Telephone Company IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Eight Thousand Dollars ($8,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made within thirty (30) days of the release date of this order by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding and payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to Kings Telephone Company, 5185 Long Island Drive, N.W. Atlanta GA 32327, by Certified Mail, Return Receipt Requested.

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[1] Under Section 22.43 of the Commission's Rules, Kings was required to complete construction of base stations to provide coverage of at least 75 percent of the CGSA within 36 months (*i.e.*, by February 6, 1993).

[2] Section 312(f)(1) of the Communications Act provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Commissions Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-280

In the Matter of

Amendment of Section 73.202(b). RM-8369
Table of Allotments.
FM Broadcast Stations.
(Lund, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 23, 1994; Released: June 1, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Keith E. Lamonica ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 8150 (1993), proposing the allotment of Channel 264A to Lund, Nevada, as the community's first local aural transmission service. Petitioner failed to file comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted, and absent such an expression of interest, it is the Commission's policy to refrain from allotting the channel. Therefore, petitioner's request to allot Channel 264A to Lund will be dismissed.

3. Accordingly, IT IS ORDERED, That the request of Keith E. Lamonica to allot Channel 264A to Lund, Nevada, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-281

In the Matter of

Amendment of Section 73.202(b), RM-8370
Table of Allotments,
FM Broadcast Stations.
(Austin, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 23, 1994; Released: June 1, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Keith E. Lamonica ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 8154 (1993), proposing the allotment of Channel 259A to Austin, Nevada, as the community's first local aural transmission service. Petitioner failed to file comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted, and absent such an expression of interest, it is the Commission's policy to refrain from allotting the channel. Therefore, petitioner's request to allot Channel 259A to Austin will be dismissed.

3. Accordingly, IT IS ORDERED, That the request of Keith E. Lamonica to allot Channel 259A to Austin, Nevada, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-285

In the Matter of

Amendment of Section 73.202(b), RM-8376
Table of Allotments,
FM Broadcast Stations.
(Alamo, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 23, 1994; Released: June 1, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Keith E. Lamonica ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 8152 (1993), proposing the allotment of Channel 228A to Alamo, Nevada, as the community's first local aural transmission service. Petitioner failed to file comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted, and absent such an expression of interest, it is the Commission's policy to refrain from allotting the channel. Therefore, petitioner's request to allot Channel 228A to Alamo will be dismissed.

3. Accordingly, IT IS ORDERED, That the request of Keith E. Lamonica to allot Channel 228A to Alamo, Nevada, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Motion to Accept Late
Pleading and Petitions
for Stay and Review of
Local Rate Order of
City of Columbia
Heights, Minnesota.

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we deny the Motion to Accept Pleading Filed One Day Late submitted to the Commission by Meredith/New Heritage Strategic Partners, L.P.("Meredith") on April 12, 1994. We also dismiss the Petition for Review filed by Meredith objecting to an order of the City of Columbia Heights, Minnesota ("Columbia Heights" or "City") which established rates for regulated basic cable service ("local rate order"). The Petition for Review was filed out of time. The Petition for Stay has been rendered moot by our dismissal of the Petition for Review and is also dismissed.

II. BACKGROUND

2. By an order dated February 28, 1994, the City adopted an order setting a rate for the basic service tier and an hourly service charge, both of which were less than the rate and charge then in effect. Refunds to subscribers were ordered based on the difference between the old and new rates and charges. Meredith filed its Petitions for a Stay and Review of the order on April 12, 1994. With those Petitions, Meredith filed a Motion to Accept the Pleadings One Day Late.

3. Under the Commission's rate regulations, appeals of the franchising authority's decision must be filed with the Commission "within 30 days of release of the text of the franchising authority's decision".[1] Here, the franchising authority adopted its local rate order on February 28, 1994 but Meredith did not file its appeal until April 12, 1994. In explanation, Meredith states that its appeal was filed in response to receipt of a copy of the text of the City's order by letter dated March 10, 1994.[2] Then, because the 30-day period after March 10, 1994 had expired before Meredith filed its Petitions, Meredith submitted its Motion to file one day late.[3] Meredith claims that computer difficulties had delayed the filing of the Petitions.[4]

4. The City filed an Opposition to Meredith's Motion, in which it argues that Meredith had 30 days from the release of the local rate order in which to file its Petitions; that it had failed to do so; that the City had met all required deadlines; and that Meredith should not be permitted to file out of time. In addition, the City argues that Meredith was represented at the public meeting of February 28, 1994 at which the City adopted the order and during which Meredith had an opportunity to address the City. Meredith was provided with a copy of the rate order at the meeting, and the order was issued to the general public at that time. Therefore, Meredith was not one day late, but was 13 days late. The City states that the copy provided Meredith on March 10, 1994 was merely a courtesy copy.[5] In its Reply to the Opposition, Meredith admits that it was in possession of the text of the order prior to its adoption, although the order was in draft form, and fails to refute the City's allegation that the text was released to the public at the meeting on February 28, 1994.[6] Neither Meredith nor the City indicates that any changes were made in the draft order at the public meeting.

III. DISCUSSION

5. We need not address whether Meredith was late in filing its Petitions with the Commission by 13 days rather than by one day. It was late by any measure. Meredith knew the decision of the City on February 28, 1994. Meredith was given the opportunity to participate at that public meeting. Meredith was in possession of a copy of the rate order that was adopted at that public meeting. Even if the 30-day period in which to file began to run on March 10, 1994 and not as early as February 28, 1994, Meredith had from March 10 to April 11 to complete its filing.

6. The Cable Act establishes primary jurisdiction over basic service tier rates and equipment and installation charges in the local franchising authorities. The reasonableness of cable programming service rates and appeals of local franchising authorities' rate decisions are the responsibility of the Commission.[7] In this case, the City, as local franchising authority, acted in accordance with that mandate and met all statutory and regulatory time constraints. The cable operator did not.

7. Accordingly, IT IS ORDERED, that the Motion to Accept Pleading Filed One Day Late of Meredith/New Heritage Strategic partners, L.P. is denied. The Petition for Review is dismissed for failure to comply with the filing

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[1] 47 C.F.R. § 76.944(b).

[2] Meredith's Emergency Petition for a Stay, 2.

[3] The cover letter for the rate order sent to counsel for Meredith is date-stamped "March 11, 1994", which appears to indicate that Meredith did not receive that copy of the rate order until that date. But even if the 30-day filing period did not begin to run until March 12, 1994, the due date remains April 11, 1994 because the 30th day from March 11 is Sunday, April 10. The next business day is Monday, April 11, 1994.

[4] Meredith Motion to Accept Pleading Filed One Day Late, 1.

[5] City's Opposition to the Motion of Meredith, 2-3.

[6] Meredith Reply to Opposition, 3.

[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1464, 47 U.S.C. § 543.

deadline established by the Commission's rules. The Emergency Petition for a Stay of Enforcement Pending Review is rendered moot.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Deputy Chief, Cable Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Motion to Accept Late
Pleading and Petitions
for Stay and Review
of Local Rate Order of
North Suburban Cable
Communications Commission

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order,* we deny the Motion to Accept Pleading Filed One Day Late submitted to the Commission by Meredith/New Heritage Strategic Partners, L.P.("Meredith") on April 12, 1994. We also dismiss the Petition for Review filed by Meredith objecting to an order of North Suburban Cable Communications Commission ("North Suburban" or "Commission") which established rates for regulated basic cable service ("local rate order"). The Petition for Review was filed out of time. The Petition for Stay has been rendered moot by our dismissal of the Petition for Review and is also dismissed.

II. BACKGROUND

2. By an order dated March 3, 1994, North Suburban adopted an order setting a rate for the basic service tier and an hourly service charge, both of which were less than the rate and charge then in effect. Refunds to subscribers were ordered based on the difference between the old and new rates and charges. Meredith filed its Petitions for a Stay and Review of the order on April 12, 1994. With those Petitions, Meredith filed a Motion to Accept the Pleadings One Day Late.

3. Under the Commission's rate regulations, appeals of the franchising authority's decision must be filed with the Commission "within 30 days of release of the text of the franchising authority's decision".[1] Here, the franchising authority adopted its local rate order on March 3, 1994 but Meredith did not file its appeal until April 12, 1994. In explanation, Meredith states that its appeal was filed in response to receipt of a copy of the text of North Suburban's order by letter dated March 10, 1994.[2] Then, because the 30-day period after March 10, 1994 had expired before Meredith filed its Petitions, Meredith submitted its Motion to file one day late.[3] Meredith claims that computer difficulties had delayed the filing of the Petitions.[4]

4. North Suburban filed an Opposition to Meredith's Motion, in which it argues that Meredith had 30 days from the release of the local rate order in which to file its Petitions; that it had failed to do so; that North Suburban had met all required deadlines; and that Meredith should not be permitted to file out of time. In addition, North Suburban argues that Meredith was represented at the public meeting of March 3, 1994 at which North Suburban adopted the order and during which Meredith had an opportunity to address North Suburban. Meredith was provided with a copy of the rate order at the meeting, and the order was issued to the general public at that time. Therefore, Meredith was not one day late, but was eight days late. North Suburban states that the copy provided Meredith on March 10, 1994 was merely a courtesy copy.[5] In its Reply to the Opposition, Meredith admits that it was in possession of the text of the order prior to its adoption, although the order was in draft form, and fails to refute North Suburban's allegation that the text was released to the public at the meeting on March 3, 1994.[6] Neither Meredith nor North Suburban indicates that any changes were made in the draft order at the public meeting.

III. DISCUSSION

5. We need not address whether Meredith was late in filing its Petitions with the Commission by eight days rather than by one day. It was late by any measure. Meredith knew the decision of the City on March 3, 1994. Meredith was given the opportunity to participate at that public meeting. Meredith was in possession of a copy of the rate order that was adopted at that public meeting. Even if the 30-day period in which to file began to run on March 10, 1994 and not March 3, 1994, Meredith had from March 10 to April 11 to complete its filing.

6. The Cable Act establishes primary jurisdiction over basic service tier rates and equipment and installation charges in the local franchising authorities. The reasonableness of cable programming service rates and appeals of local franchising authorities' rate decisions are the responsibility of the Commission.[7] In this case, North Suburban, as local franchising authority, acted in accordance with that mandate and met all statutory and regulatory time constraints. The cable operator did not.

7. Accordingly, IT IS ORDERED, that the Motion to Accept Pleading Filed One Day Late of Meredith/New Heritage Strategic partners, L.P. is denied. The Petition for

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[1] 47 C.F.R. § 76.944(b).
[2] Meredith's Emergency Petition for a Stay, 2.
[3] The cover letter for the rate order sent to counsel for Meredith is date-stamped "March 11, 1994", which appears to indicate that Meredith did not receive that copy of the rate order until that date. But even if the 30-day filing period did not begin to run until March 12, 1994, the due date remains April 11, 1994 because the 30th day from March 11 is Sunday, April 10. The next business day is Monday, April 11, 1994.
[4] Meredith Motion to Accept Pleading Filed One Day Late, 1.
[5] North Suburban's Opposition to the Motion of Meredith, 2-3.
[6] Meredith Reply to Opposition, 3.
[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1464, 47 U.S.C. § 543.

Review is dismissed for failure to comply with the filing deadline established by the Commission's rules. The Emergency Petition for a Stay of Enforcement Pending Review is rendered moot.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Deputy Chief, Cable Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Motion to Accept Late
Pleading and Petitions
for Stay and Review of
Local Rate Order of
Burnsville/Eagan
Cable Communications
Commission

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we deny the Motion to Accept Pleading Filed One Day Late submitted to the Commission by Meredith/New Heritage Strategic Partners, L.P.("Meredith") on April 12, 1994. We also dismiss the Petition for Review filed by Meredith objecting to an order of the Burnsville/Eagan Cable Communications Commission ("Burnsville/Eagan"" or "Commission") which established rates for regulated basic cable service ("local rate order"). The Petition for Review was filed out of time. The Petition for Stay has been rendered moot by our dismissal of the Petition for Review and is also dismissed.

II. BACKGROUND

2. By an order dated March 9, 1994, Burnsville/Eagan adopted an order setting a rate for the basic service tier and an hourly service charge, both of which were less than the rate and charge then in effect. Refunds to subscribers were ordered based on the difference between the old and new rates and charges. Meredith filed its Petitions for a Stay and Review of the order on April 12, 1994. With those Petitions, Meredith filed a Motion to Accept the Pleadings One Day Late.

3. Under the Commission's rate regulations, appeals of the franchising authority's decision must be filed with the Commission "within 30 days of release of the text of the franchising authority's decision".[1] Here, the franchising authority adopted its local rate order on March 9, 1994 but Meredith did not file its appeal until April 12, 1994. In explanation, Meredith states that its appeal was filed in response to receipt of a copy of the text of Burnsville/Eagan's order by letter dated March 10, 1994.[2] Then, because the 30-day period after March 10, 1994 had expired before Meredith filed its Petitions, Meredith submitted its Motion to file one day late.[3] Meredith claims that computer difficulties had delayed the filing of the Petitions.[4]

4. Burnsville/Eagan filed an Opposition to Meredith's Motion, in which it argues that Meredith had 30 days from the release of the local rate order in which to file its Petitions; that it had failed to do so; that Burnsville/Eagan had met all required deadlines; and that Meredith should not be permitted to file out of time. In addition, Burnsville/Eagan argues that Meredith was represented at the public meeting of March 9, 1994 at which Burnsville/Eagan adopted the order and during which Meredith had an opportunity to address Burnsville/Eagan. Meredith was provided with a copy of the rate order at the meeting, and the order was issued to the general public at that time. Therefore, Meredith was not one day late, but was four days late. Burnsville/Eagan states that the copy provided Meredith on March 10, 1994 was merely a courtesy copy.[5] In its Reply to the Opposition, Meredith admits that it was in possession of the text of the order prior to its adoption, although the order was in draft form, and fails to refute Burnsville/Eagan's allegation that the text was released to the public at the meeting on March 9, 1994.[6] Neither Meredith nor Burnsville/Eagan indicates that any changes were made in the draft order at the public meeting.

III. DISCUSSION

5. We need not address whether Meredith was late in filing its Petitions with the Commission by four days rather than by one day. It was late by any measure. Meredith knew the decision of Burnsville/Eagan on March 9, 1994. Meredith was given the opportunity to participate at that public meeting. Meredith was in possession of a copy of the rate order that was adopted at that public meeting. Even if the 30-day period in which to file began to run on March 10, 1994 and not March 9, 1994, Meredith had from March 10 to April 11 to complete its filing.

6. The Cable Act establishes primary jurisdiction over basic service tier rates and equipment and installation charges in the local franchising authorities. The reasonableness of cable programming service rates and appeals of local franchising authorities' rate decisions are the responsibility of the Commission.[7] In this case, Burnsville/Eagan,

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[1] 47 C.F.R. § 76.944(b).

[2] Meredith's Emergency Petition for a Stay, 2.

[3] The cover letter for the rate order sent to counsel for Meredith is date-stamped "March 11, 1994", which appears to indicate that Meredith did not receive that copy of the rate order until that date. But even if the 30-day filing period did not begin to run until March 12, 1994, the due date remains April 11, 1994 because the 30th day from March 11 is Sunday, April 10. The next business day is Monday, April 11, 1994.

[4] Meredith Motion to Accept Pleading Filed One Day Late, 1.

[5] Burnsville/Eagan's Opposition to the Motion of Meredith, 2-3.

[6] Meredith Reply to Opposition, 3.

[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1464, 47 U.S.C. § 543.

as local franchising authority, acted in accordance with that mandate and met all statutory and regulatory time constraints. The cable operator did not.

7. Accordingly, IT IS ORDERED, that the Motion to Accept Pleading Filed One Day Late of Meredith/New Heritage Strategic partners, L.P. is denied. The Petition for Review is dismissed for failure to comply with the filing deadline established by the Commission's rules. The Emergency Petition for a Stay of Enforcement Pending Review is rendered moot.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Deputy Chief, Cable Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Motion to Accept Late
Pleading and Petitions
for Stay and Review of
Local Rate Order of
North Central Suburban
Cable Communications Commission

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we deny the Motion to Accept Pleading Filed One Day Late submitted to the Commission by Meredith/New Heritage Strategic Partners, L.P. ("Meredith") on April 12, 1994. We also dismiss the Petition for Review filed by Meredith objecting to an order of the North Central Suburban Cable Communications Commission ("North Central" or "Commission") which established rates for regulated basic cable service ("local rate order"). The Petition for Review was filed out of time. The Petition for Stay has been rendered moot by our dismissal of the Petition for Review and is also dismissed.

II. BACKGROUND

2. By an order dated February 16, 1994, North Central adopted an order setting a rate for the basic service tier and an hourly service charge, both of which were less than the rate and charge then in effect. Refunds to subscribers were ordered based on the difference between the old and new rates and charges. Meredith filed its Petitions for a Stay and Review of the order on April 12, 1994. With those Petitions, Meredith filed a Motion to Accept the Pleadings One Day Late.

3. Under the Commission's rate regulations, appeals of the franchising authority's decision must be filed with the Commission "within 30 days of release of the text of the franchising authority's decision".[1] Here, the franchising authority adopted its local rate order on February 16, 1994 but Meredith did not file its appeal until April 12, 1994. In explanation, Meredith states that its appeal was filed in response to receipt of a copy of the text of North Central's order by letter dated March 10, 1994.[2] Then, because the 30-day period after March 10, 1994 had expired before Meredith filed its Petitions, Meredith submitted its Motion to file one day late.[3] Meredith claims that computer difficulties had delayed the filing of the Petitions.[4]

4. North Central filed an Opposition to Meredith's Motion, in which it argues that Meredith had 30 days from the release of the local rate order in which to file its Petitions; that it had failed to do so; that North Central had met all required deadlines; and that Meredith should not be permitted to file out of time. In addition, North Central argues that Meredith was represented at the public meeting of February 16, 1994 at which North Central adopted the order and during which Meredith had an opportunity to address North Central. Meredith was provided with a copy of the rate order at the meeting, and the order was issued to the general public at that time. Therefore, Meredith was not one day late, but was 25 days late. North Central states that the copy provided Meredith on March 10, 1994 was merely a courtesy copy.[5] In its Reply to the Opposition, Meredith admits that it was in possession of the text of the order prior to its adoption, although the order was in draft form, and fails to refute North Central's allegation that the text was released to the public at the meeting on February 16, 1994.[6] Neither Meredith nor North Central indicates that any changes were made in the draft order at the public meeting.

III. DISCUSSION

5. We need not address whether Meredith was late in filing its Petitions with the Commission by 25 days rather than by one day. It was late by any measure. Meredith knew the decision of North Central on February 16, 1994. Meredith was given the opportunity to participate at that public meeting. Meredith was in possession of a copy of the rate order that was adopted at that public meeting. Even if the 30-day period in which to file began to run on March 10, 1994 and not February 16, 1994, Meredith had from March 10 to April 11 to complete its filing.

6. The Cable Act establishes primary jurisdiction over basic service tier rates and equipment and installation charges in the local franchising authorities. The reasonableness of cable programming service rates and appeals of local franchising authorities' rate decisions are the responsibility of the Commission.[7] In this case, North Central, as local franchising authority, acted in accordance with that mandate and met all statutory and regulatory time constraints. The cable operator did not.

7. Accordingly, IT IS ORDERED, that the Motion to Accept Pleading Filed One Day Late of Meredith/New Heritage Strategic partners, L.P. is denied. The Petition for

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[1] 47 C.F.R. § 76.944(b).

[2] Meredith's Emergency Petition for a Stay, 2.

[3] The cover letter for the rate order sent to counsel for Meredith is date-stamped "March 11, 1994", which appears to indicate that Meredith did not receive that copy of the rate order until that date. But even if the 30-day filing period did not begin to run until March 12, 1994, the due date remains April 11, 1994 because the 30th day from March 11 is Sunday, April 10. The next business day is Monday, April 11, 1994.

[4] Meredith Motion to Accept Pleading Filed One Day Late, 1.

[5] North Central's Opposition to the Motion of Meredith, 2-3.

[6] Meredith Reply to Opposition, 3.

[7] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1464, 47 U.S.C. § 543.

Review is dismissed for failure to comply with the filing deadline established by the Commission's rules. The Emergency Petition for a Stay of Enforcement Pending Review is rendered moot.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Deputy Chief, Cable Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MEREDITH/NEW HERITAGE
STRATEGIC PARTNERS, L.P.

Motion to Accept Late
Pleading and Petitions
for Stay and Review
of Local Rate Order of
Quad Cities Cable
Communications Commission

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we deny the Motion to Accept Pleading Filed One Day Late submitted to the Commission by Meredith/New Heritage Strategic Partners, L.P.("Meredith") on April 12, 1994. We also dismiss the Petition for Review filed by Meredith objecting to an order of Quad Cities Cable Communications Commission ("Quad Cities" or "Commission") which established rates for regulated basic cable service ("local rate order"). The Petition for Review was filed out of time. The Petition for Stay has been rendered moot by our dismissal of the Petition for Review and is also dismissed.

II. BACKGROUND

2. By an order dated February 17, 1994, Quad Cities adopted an order setting a rate for the basic service tier and an hourly service charge, both of which were less than the rate and charge then in effect. Refunds to subscribers were ordered based on the difference between the old and new rates and charges. Meredith filed its Petitions for a Stay and Review of the order on April 12, 1994. With those Petitions, Meredith filed a Motion to Accept the Pleadings One Day Late.

3. Under the Commission's rate regulations, appeals of the franchising authority's decision must be filed with the Commission "within 30 days of release of the text of the franchising authority's decision".[1] Here, the franchising authority adopted its local rate order on February 17, 1994 but Meredith did not file its appeal until April 12, 1994. In explanation, Meredith states that its appeal was filed in response to receipt of a copy of the text of Quad Cities' order by letter dated March 10, 1994.[2] Then, because the 30-day period after March 10, 1994 had expired before Meredith filed its Petitions, Meredith submitted its Motion to file one day late.[3] Meredith claims that computer difficulties had delayed the filing of the Petitions.[4]

4. Quad Cities filed an Opposition to Meredith's Motion, in which it argues that Meredith had 30 days from the release of the local rate order in which to file its Petitions; that it had failed to do so; that Quad Cities had met all required deadlines; and that Meredith should not be permitted to file out of time. In addition, Quad Cities argues that Meredith was represented at the public meeting of February 17, 1994 at which Quad Cities adopted the resolution and during which Meredith had an opportunity to address Quad Cities. Meredith was provided with a copy of the rate order at the meeting, and the order was issued to the general public at that time. Therefore, Meredith was not one day late, but was 22 days late.[5] Quad Cities states that the copy provided Meredith on March 10, 1994 was merely a courtesy copy.[6] In its Reply to the Opposition, Meredith admits that it was in possession of the text of the resolution prior to its adoption, although the resolution was in draft form, and fails to refute Quad Cities' allegation that the text was released to the public at the meeting on February 17, 1994.[7] Neither Meredith nor Quad Cities indicates that any changes were made in the draft resolution at the public meeting.

III. DISCUSSION

5. We need not address whether Meredith was late in filing its Petitions with the Commission by 22 days rather than by one day. It was late by any measure. Meredith knew the decision of Quad Cities on February 17, 1994. Meredith was given the opportunity to participate at that public meeting. Meredith was in possession of a copy of the rate order that was adopted at that public meeting. Even if the 30-day period in which to file began to run on March 10, 1994 and not February 17, 1994, Meredith had from March 10 to April 11 to complete its filing.

6. The Cable Act establishes primary jurisdiction over basic service tier rates and equipment and installation charges in the local franchising authorities. The reasonableness of cable programming service rates and appeals of local franchising authorities' rate decisions are the responsibility of the Commission.[8] In this case, Quad Cities, as

[1] 47 C.F.R. § 76.944(b).
[2] Meredith's Emergency Petition for a Stay, 2.
[3] The cover letter for the rate order sent to counsel for Meredith is date-stamped "March 11, 1994", which appears to indicate that Meredith did not receive that copy of the rate order until that date. But even if the 30-day filing period did not begin to run until March 12, 1994, the due date remains April 11, 1994 because the 30th day from March 11 is Sunday, April 10. The next business day is Monday, April 11, 1994.
[4] Meredith Motion to Accept Pleading Filed One Day Late, 1.
[5] Actually, Quad Cities states that the order was available to the public and Petitioner for 53 days prior to filing. A submission due 30 days after February 17 would be due March 21. So a pleading filed on April 12 would be 22 days late.
[6] Quad Cities' Opposition to the Motion of Meredith, 2-3.
[7] Meredith Reply to Opposition, 3.
[8] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1464, 47 U.S.C. § 543.

local franchising authority, acted in accordance with that mandate and met all statutory and regulatory time constraints. The cable operator did not.

7. Accordingly, IT IS ORDERED, that the Motion to Accept Pleading Filed One Day Late of Meredith/New Heritage Strategic partners, L.P. is denied. The Petition for Review is dismissed for failure to comply with the filing deadline established by the Commission's rules. The Emergency Petition for a Stay of Enforcement Pending Review is rendered moot.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Deputy Chief, Cable Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SAMMONS COMMUNICATIONS, INC.

Request for Stay
of Enforcement of Local
Rate Order of City of
Burbank, CA.

ORDER

Adopted: May 20, 1994; Released: May 23, 1994

By the Acting Chief, Cable Services Bureau:

1. Sammons Communications, Inc. filed on May 5, 1994 a Petition for Stay of the local rate order adopted April 5, 1994 by its franchising authority, the City of Burbank, California. In the local rate order, Burbank established regulated rates for basic cable service and associated equipment, provided by Sammons, as required by the Cable Television Consumer Protection and Competition Act of 1992. *See* §623(b) of the Communications Act of 1934, as amended, 47 U.S.C. §543(b). Burbank accepted the basic service rate, proposed by Sammons, but prescribed a reduced hourly service charge and related equipment rates. Sammons was ordered to refund to subscribers the overage back to September 1, 1993. This refund liability, Sammons argues, is in excess of permitted levels.

2. Sammons seeks a stay of the local rate order, which is effective May 20, 1994, pending Commission resolution of its appeal on the merits. Burbank has not submitted any papers in opposition to the Sammons Stay Petition, and we understand from counsel that Burbank does not intend to submit any opposition.

3. The Commission evaluates petitions for stay under well settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay. *See Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 673-74 (D.C. Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (defining standard). As discussed below, resolution of this stay petition centers primarily on the strength of petitioner's argument regarding the first prong of this test.

4. We believe the Commission should not conduct *de novo* review of local rate decisions and that the standard of review should be to determine whether there is a reasonable basis for the franchising authority's decision. We will defer to the judgment of the local franchising authority provided that there is a rational basis for the decision.

5. However, as we explained in TCI Cablevision of St. Louis, Inc., DA 94-424 (Rel. April 29, 1994), if a franchising authority approves the cable operator's proposed rates for basic cable service while reducing permitted equipment rates, without allowing an offsetting increase in the tier charge for basic service, the franchising authority is requiring refunds of liability in excess of maximum levels permitted by Commission regulations. We emphasized our expectation that franchising authorities adhere strictly to the mathematical principles underlying the benchmark methodology, particularly when calculating an operator's refund liability. *Id.* at ¶ 7.

6. Because the Sammons submission appears to show that a misapplication of our rules may have occurred, and because Burbank has not filed any opposition, we grant the Sammons Petition for Stay, pending full review of this case on the merits. In order to protect the interests of subscribers, we will require Sammons to place in an interest-bearing escrow account the sum Burbank has ordered to be refunded, and accumulate in the escrow account the difference between the rates ordered by the City and the prices charged by Sammons as subscriber fees are collected during the period of the stay. Sammons must furnish the Commission with documentation demonstrating its compliance with this order within thirty (30) days of the release of this order. Finally, Sammons must notify all subscribers of the possibility that they may receive a refund, and advise subscribers who may be planning to relocate outside the franchising area to provide Sammons with a forwarding address to which refunds may be delivered.[1]

7. Accordingly, IT IS ORDERED, pursuant to §1.45(e) of the Commission's rules (47 C.F.R. §1.45 (e)), that the local rate order adopted by the City of Burbank, California is STAYED pending our resolution of this appeal. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's rules (47 C.F.R. §0.321).

8. IT IS FURTHER ORDERED that the amount of the refunds required in Burbank's local rate order, and the amount of the difference between rates ordered by the City and the subscriber fees collected during the period of the stay, SHALL BE PLACED by Sammons in an interest-bearing escrow account, and that proof of this shall be filed with the Commission within thirty (30) days of the release of this order. Interest shall accrue at the prevailing U.S. Internal Revenue Service Rate.

9. IT IS FURTHER ORDERED that this *Order* is effective upon adoption.

[1] We are not prejudging the method of refund to be used by Sammons in the event Sammons does not prevail on appeal. Rather, we take this action to ensure that all options remain open. 47 C.F.R. §76.942.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-1

In the Matter of

Price Cap Performance Review
for Local Exchange Carriers

Motion for Extension of Time

ORDER

Adopted: May 23, 1994; Released: May 24, 1994

By the Acting Chief, Common Carrier Bureau:

1. On May 18, 1994, the United States Telephone Association (USTA) filed a motion for extension of time to file reply comments in the above-mentioned docket. Reply comments are scheduled to be filed by June 8, 1994. USTA seeks an extension until June 22, 1994.

2. USTA states that on May 9, 1994, thirty-nine parties filed comments on the FCC's Notice of Proposed Rulemaking and that commentors were generally responsive to the Commission's request for data on a wide variety of issues. USTA observes that the comments are voluminous with over 3,000 pages filed. It maintains that a short extension of the reply period will allow all interested parties time to review fully the submissions of others and prepare meaningful responses, and thus enable a comprehensive record to be developed that will facilitate the Commission's consideration of the issues.

3. USTA asserts that it must review the extensive comments filed, gather necessary data, coordinate the efforts of its consultants and fully integrate the data and expert statements into a comprehensive reply. It insists that it will be difficult, if not impossible, to complete this effort in only 30 days. USTA expects that other commentors may be similarly constrained by the short time allotted. It further asserts that allowing commentors an additional two weeks at this stage could actually expedite the Commission's work later in the proceeding.

4. The Common Carrier Bureau has reviewed USTA's request for extension of time and has determined that good cause has been shown to grant all interested parties additional time, until June 22, 1994, to file reply comments.

5. Therefore, IT IS ORDERED that the United States Telephone Association's motion for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 24, 1994

SOUTHWESTERN BELL PETITIONS FOR WAIVER OF THE REQUIREMENT IN THE ALTERNATE TECHNOLOGY ORDER CC DOCKET NO. 88-287

Pleading Cycle Established

COMMENTS: June 22, 1994
REPLY COMMENTS: July 7, 1994

On April 12, 1994, the Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of the requirement set forth in the *Alternate Technology Order* that after December 31, 1992, Southwestern charge less than premium rates for access provided through alternate technology.

Southwestern indicates that as of March 1, 1994, there are 83 unconverted step-by-step end offices in Oklahoma serving approximately seven percent of the total access lines in the state. It intends in 1994 to make full equal access conversions of 10 Oklahoma step-by-step end offices. Southwestern states that six-month notification has been released for nine of these conversions. It further states that this waiver request does not involve the 10 Oklahoma step-by-step end offices to be fully converted in 1994. This request does involve however, the remaining 73 step-by-step Oklahoma end offices which Southwestern intends to convert, by means of alternate technology, in 1994. Southwestern requests that it be allowed to charge premium rates from those 73 end offices until December 31, 1997.

Interested parties may file comments on Southwestern's petition for waiver no later than June 22, 1994. Replies should be filed by July 7, 1994.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. — Transmittal No. 446

Open Network Architecture Tariffs

ORDER

Adopted: May 23, 1994; **Released: May 25, 1994**

By the Chief, Common Carrier Bureau:

1. In November 1991, US West Communications, Inc. (US West) filed tariffs to provide Open Network Architecture (ONA) service, as required by the Commission's *Part 69 ONA Order*.[1] Specifically, the Commission ordered the Bell Operating Companies (BOCs) to unbundle from their existing feature group access arrangements optional service offerings, known as basic service elements (BSEs). These BSEs were distinguished from the essential, underlying switching and transmission services, which are called basic serving arrangements (BSAs).[2] It was necessary for the BOCs to use computer models to develop investment data on which to base the unbundled BSE rates.[3]

2. The Common Carrier Bureau (Bureau) suspended the ONA rates of US West and the other BOCs for one day,[4] and initiated an investigation into the lawfulness of those rates, which was completed in December 1993, with the issuance of a Commission order.[5] Unlike the other BOCs which used one computer model for all their BSE rates, US West developed its BSE investment costs from two separate software models that were not consistent with each other.[6] Moreover, some factual materials upon which US West had relied were seriously outdated.[7] The Commission required US West to file replacement rates rectifying these and other problems.[8] US West filed the replacement ONA rates in Transmittal No. 446 on January 26, 1994. No petitions were filed against US West's filing.

3. In Transmittal No. 446, US West relies exclusively on a computer model it developed, the Switching Cost Model (SCM), to determine its BSE investment costs, rather than the model used by the other six BOCs.[9] US West asserts that the SCM was sufficiently reviewed in the prior investigation, and need not be examined anew in this proceeding.[10] US West, however, has revised the SCM that the Commission reviewed in connection with the *ONA Final Order*,[11] and it is not yet clear whether or how these revisions affect the model. Our examination of SCM is not complete at this time, because US West submitted the User Manual for the SCM software on April 19, 1994, almost three months after it filed its tariff.[12] Furthermore, the workpapers US West submitted to support its tariffed rates are inconsistent with the workpapers that it filed to support the direct costs on which those rates are supposed to be based. Finally, US West has not demonstrated that it has corrected the deficiencies in its ratemaking methodology outlined in the *ONA Final Order*. Thus, we conclude that Transmittal 446 raises substantial questions of lawfulness which warrant investigation. We will designate specific issues for investigation in a future Order.

4. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the US West Communications, Inc., Transmittal No. 446, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal, and any future tariff revisions modifying that transmittal, IS INSTITUTED.

5. IT IS FURTHER ORDERED that US West Communications, Inc. SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59. US West Communications, Inc., should cite the "DA" number of this Order as the authority for this filing.

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[1] Amendments of Part 69 of the Commission's Rules Relating to the Creation of access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), *modified on recon*, 7 FCC Rcd 5235 (1992), *further modified on recon*, 8 FCC Rcd 3114 (1993).

[2] *See id.* at 4526 (para. 8).

[3] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with Open Network Architecture Tariffs, 7 FCC Rcd 1526 (Com. Car. Bur. 1992) (*SCIS Disclosure Order*).

[4] The Bureau suspended the ONA tariffs of US West and five other BOCs in January 1992. Bell Atlantic Telephone Companies, 7 FCC Rcd 1512 (Com. Car. Bur. 1992) (*ONA Investigation Order*). The ONA tariff filed by one BOC was suspended in an earlier Order. Ameritech Operating Companies, 7 FCC Rcd 257 (Com. Car. Bur. 1991) (*Ameritech ONA Order*).

[5] Open Network Architecture Tariffs of Bell Operating Companies, CC Docket No. 92-91, 9 FCC Rcd 440 (1993) (*ONA Final Order*).

[6] *ONA Final Order*, 9 FCC Rcd at 461-62 (paras. 56-59).

[7] *Id.* at 461-62 (para. 58).

[8] *Id.* at 463 (paras. 61-63).

[9] The model used by other BOCs is the Switching Cost Information System (SCIS).

[10] Letter from Cyndie Eby, US West, to Gregory J. Vogt, Chief, Tariff Division (Apr. 11, 1994).

[11] US West Transmittal No. 446, Description and Justification (D&J), at 2-1.

[12] On April 21, 1994, US West requested that the User Manual for the SCM software be kept confidential pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459. We have previously determined that materials such as these are exempt from the mandatory disclosure provisions of the Freedom of Information Act. Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 7 FCC Rcd 521, 521 n.4 (Com. Car. Bur. 1991); *App'n for Review Denied*, 8 FCC Rcd 422 (1993); Allnet Communications Services, FOIA Control No. 92-266, 7 FCC Rcd 6329 (1992); *upheld* Allnet Communications Services, Inc. v. FCC, 800 F. Supp. 984 (D.D.C. 1992); *appeal pending* Allnet Communications Services, Inc. v. FCC, D.C. Cir. No. 92-5351 (filed Sept. 30, 1992). We therefore grant US West's request for confidential treatment.

6. IT IS FURTHER ORDERED that pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), US West Communications, Inc. shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

7. IT IS FURTHER ORDERED that pursuant to Section 0.459 of the Commission's Rules, 47 C.F.R. § 0.459, the request for confidential treatment of the User Manual for the Switching Cost Model software submitted by US West Communications, Inc., IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

Emery Telephone

Notice of Apparent Liability for Forfeiture Penalty for Station KNKO305 in the Public Land Mobile Service at Castle Dale, Utah

File No. 316MS0020

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 23, 1994; Released: June 2, 1994

By the Chief, Mobile Services Division:

1. On September 26, 1991, the Commission granted an authorization to Emery Telephone (Emery) to operate on frequency 152.51 MHz at 3 blocks west of Center Street, Castle Dale, Utah. The expiration date of the authorization was September 26, 1992. On January 3, 1994, Emery filed a request for Special Temporay Authority (STA) to continue operation while waiting for reinstatement due to letting the construction permit lapse. The STA was granted January 10, 1994.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Emery commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that Emery's failure to file a Form 489 before or on September 26, 1993, constitutes willful conduct within the terms of the statute.[1] In its request for STA, Emery proclaims that the licenses were allowed to lapse.

4. Pursuant to the Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, FCC 93-382, released Aug. 12, 1993, the base forfeiture amount for failing to file required forms is $20,000. The forfeiture is being adjusted downward by $10,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $6,000 because Emery voluntarily disclosed its failure to timely file the FCC Form 489. Consequently, a $4,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, Emery Telephone IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Four Thousand Dollars ($4,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to Emery Telephone, 150 South Main, P.O. Box 629, Orangeville, Utah 84537, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Subpart S of
Part 90 of the Rules to
Remove Certain Restrictions on
the Licensing of Channels
in the 806-821/851-866 MHz
Band in the U.S./Canada Border
Area

ORDER

Adopted: May 24, 1994; Released: June 2, 1994

By the Deputy Chief, Private Radio Bureau

1. On January 4, 1994, the United States and Canada exchanged Notes that modified the "Arrangement Between the Department of Communications of Canada and the Federal Communications Commission of the United States Concerning the use of the Band 806-890 MHz along the Canada-United States Border." The effect of these modifications was to remove certain restrictions on land mobile radio operations along the U.S./Canada border that were designed to protect the operation of certain Canadian UHF television stations. This *Order* modifies Subpart S of Part 90, 47 C.F.R. Part 90, to conform the rules to the modified agreement and to permit land mobile licensing on the relevant frequencies in the previously restricted areas along the Canadian border. These channels are immediately available for licensing.

2. These rule changes will facilitate the construction and operation of additional Private Land Mobile Radio stations in the Canadian border area. This should result in improved mobile communication service to the public without adversely affecting any party. As this *Order* does not impose new rules on licensees that would adversely affect their substantive rights, we find that notice and comment procedures are neither necessary nor appropriate.[1] To initiate a notice and comment procedure to make these additional channels available for licensing in the relevant Canadian border area would significantly delay the use of these channels without any countervailing public interest benefit. Further, because the rule changes relieve a restriction, we also conclude that these changes should become effective immediately upon publication in the Federal Register.[2]

3. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. 154(i) and 303(r) and Section 0.331(a)(1) of the Commission's Rules, 47 C.F.R. § 0.331(a)(1), that Part 90 of the Commission's Rules is amended as set forth in the attached Appendix.

4. IT IS FURTHER ORDERED that, because these amendments eliminate a restriction on the use of spectrum in the Canadian border area, this *Order* is effective immediately upon adoption. *See* 5 U.S.C. § 553(d).

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

APPENDIX

47 C.F.R. Part 90 is amended as follows:

Part 90- Private Land Mobile Radio Services

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.619 is amended by revising paragraph (b)(5) and removing and reserving paragraph (b)(6) to read as follows:

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S./Canada border areas.

* * * * *

(b)* * *

(5) Applicants requesting authorizations in the frequency bands in the geographical areas listed below shall submit documentation indicating compliance with the following protection criteria to the indicated Canadian television station. Protection to Canadian television assignments and allotments is based on the field strength of an interfering mobile radio signal at the TV station's calculated Grade B contour (64 dBu) not exceeding the TV field strength by more than 20 dB (i.e., 84 dBu). The field strength of the TV assignment or allotment is calculated using the R6602 |F(50,50)| propagation curves and any land mobile base station interfering signal is calculated using the R6602 |F(50,10)| propagation curves at a receiving effective antenna height of 9.1 meters (30 feet). Where the calculated field strength of the TV assignment or allotment exceeds the Grade B contour value of 64 dBu at the Canada/U.S.A. border, the land mobile radio signal may not exceed the actual calculated TV field strength at the border by more than 20 dB.

[1] *See* 5 U.S.C. § 553(b)(3)(B).
[2] *See* 5 U.S.C. § 553(d)(1).

Frequency Bands (MHz)	Areas
852-853.25 MHz (Cornwall - TV Channel 63)	Area bounded by a line joining, clockwise, the following coordinates: starting at point 45°00'00" N. Lat., 74°38'00" W. Long., moving east along the Canada/USA border to point 44°59'30" N. Lat., 74°05'00" W. Long., moving south west to point 44°56'30" N. Lat., 74°08'00" W. Long. moving west to point 45°00'00" N. Lat., 74°38'00" W. Long. The second area is bounded by a line joining, clockwise, the following coordinates: 44°50'30" N. Lat., 75°17'30" W. Long., moving east along the Canada/USA border to point 44°55'30" N. Lat., 75°05'00" W. Long., moving south to point 44°55'00" N. Lat., 75°05'00" W. Long., moving south west to point 44°53'00" N. Lat., 75°06'30" W. Long., moving south west to point 44°48'30" N. Lat., 75°14'30" W. Long., and moving north west to point 44°50'30" N. Lat., 75°17'30" W. Long.
852-854.75 MHz (Vancouver - TV Channel 63)	Area bounded by a line joining, clockwise, the following coordinates: starting at point 49°00'00" N. Lat., 122°45'30" W. Long., moving east along the Canada/USA border to point 49°00'00" N. Lat., 122°05'00" W. Long., moving south west to point 48°57'30" N. Lat., 122°09'00" W. Long., moving west to point 48°59'00" N. Lat., 122°44'30" W. Long., and moving north to point 49°00'00" N. Lat., 122°45'30" W. Long.

(6) (Reserved)

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re

Eagle Communications, Inc.

File No. 316MS0019

Notice of Apparent Liability for Forfeiture Penalty for Station KWU393 in the Public Land Mobile Service at Avon, Colorado

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: May 23, 1994; **Released: June 6, 1994**

By the Chief, Mobile Services Division:

1. On October 7, 1992, the Commission granted an authorization to Eagle Communications, Inc. (Eagle) to operate on frequency 72.90 MHz at Avon, Colorado. The expiration date of the authorization was October 7, 1993. On October 25, 1993, Eagle filed FCC Form 489, Notification of Status of Facilities, requesting reinstatement. The FCC Form 489 indicated that the application was being submitted within 30 days after expiration of the authorization and that the facilities had been constructed and operation had commenced.

2. Section 22.9(b)(1) of the Commission's Rules states:

> *Notification of status of facilities. (FCC Form 489).* When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

Therefore, because Eagle commenced operation without timely filing FCC Form 489 with the Commission, it is in apparent violation of Section 22.9(b)(1).

3. Section 503(b) of the Communications Act states in pertinent part:

> Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have--
>
> (B) willfully or repeatedly failed to comply with any of the provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter... shall be liable to the United States for a forfeiture penalty.

We find that Eagle's failure to file a Form 489 until October 25, 1993, constitutes willful and repeated conduct within the terms of the statute.[1]

4. Pursuant to the Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), the base forfeiture amount for failing to file required forms is $20,000. The forfeiture is being adjusted downward by $10,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $6,000 because Eagle voluntarily disclosed its failure to file the FCC Form 489. Consequently, a $4,000 forfeiture is assessed.

5. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b) and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, Eagle Communications, Inc. IS APPARENTLY LIABLE FOR A FORFEITURE in the amount of Four Thousand Dollars ($4,000) for willful and repeated violations of the aforementioned rule. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

6. Payment of the forfeiture may be made by mailing a check or similar instrument, noting on the payment the File Number of the above captioned proceeding, to the Commission within thirty (30) days of the release date of this order, payable to the order of the Federal Communications Commission to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

7. A copy of this Notice is being sent to Eagle Communications, Inc., Drawer 5150, Avon, Colorado 81620, by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

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[1] Section 312(f)(1) of the Communications Act provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

This definition applies to Section 503(b) of the Communications Act. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

Section 312(f)(2) of the Communications Act provides:

> The term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well. *See* H. R. Rep. No. 97-765, 97th Cong. 2d Sess. 50-51 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-309

In re Applications of

FRANK K. SPAIN	File No. BPH-900119MN
LOS AMIGOS MEDIA, A LIMITED PARTNERSHIP	File No. BPH-900122MM
KIMLER BROADCASTING, INC.	File No. BPH-900122MN
ARTISTIC AIRWAVE BROADCASTERS	File No. BPH-900122MP
LAURA WILKINSON HERRON	File No. BPH-900122MY
AVID COMMUNICATIONS, INC.	File No. BPH-900122NF
NATALIE LEDERER ROGERS	File No. BPH-900122NN

For Construction Permit for
New FM Station, Channel 233A,
Temecula, California

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1994; Released: June 3, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. On April 20, 1994 Artistic Airwave Broadcasters filed a motion to dismiss the applications of Frank K. Spain, Avid Communications, Inc., and Natalie Lederer Rogers. Oppositions were filed by Spain, Avid, and Rogers, and Artistic filed a reply. The pleadings were originally filed with the presiding Administrative Law Judge but then informally referred to the Review Board, which has jurisdiction over this proceeding. *See News Release*, Mimeo 42334 dated March 25, 1994; *Public Notice*, 9 FCC Rcd 1055 (1994); *see also CSJ Investments, Inc.*, 5 FCC Rcd 7653, 7655 n.4 (1990) (Misdirected pleadings should be informally referred to the official or forum which has authority to act on such matters).

2. In his *Initial Decision*, 8 FCC Rcd 4831 (1993) (*I.D.*), Administrative Law Judge John M. Frysiak (ALJ) denied the applications of Spain, Avid, and Rogers. None of the foregoing unsuccessful applicants filed exceptions to the *I.D.* or sought additional time to do so. A party invokes the Board's jurisdiction by timely filing exceptions pursuant to 47 CFR § 1.276(a). Any objection "not saved by an exception ... is waived." *Id.*, § 1.277(a).

3. Section 1.276(f) of the Commission's rules, 47 CFR § 1.276(f), provides that where an applicant "fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute." The Board has consistently dismissed applications pursuant to that provision, where parties have failed to file exceptions. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 832 ¶ 3(Rev. Bd. 1981) (subsequent history omitted); *see also Mark L. Wodlinger*, 3 FCC Rcd 698 (Rev. Bd. 1987) (counsel informed at oral argument that applicant he represented would not be deemed a party to existing proceeding where party did not file exceptions). Therefore, the foregoing applications of the unsuccessful applicants will be dismissed from this proceeding.

4. To the extent the parties seek to remain in this proceeding to participate in a settlement, we note the Board's admonition in *South Florida Broadcasting Company, Inc.*, 100 FCC 2d 973, 975 n.9 (Rev. Bd. 1985):

> [I]f the filing of an application purely for the purposes of extracting a settlement is prohibited, *see* 47 U.S.C. § 311(c)(3) (as amended by Pub. L. 97-259, 96 Stat. 1087, 1095, September 13, 1982), then the resurrection of a defunct application purely for such purposes may be no less a transgression.

5. ACCORDINGLY, IT IS ORDERED, That Artistic Airwave Broadcasters' motion to dismiss IS GRANTED, and that the applications of Frank K. Spain (File No. BPH-900119MN), Avid Communications, Inc. (File No. BPH-900122NF), and Natalie Lederer Rogers (File No. BPH-900122NN) ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-100

In re Applications of

MADALINA BROADCASTING, INC.	File No. BPH-890921MB
PODER BROADCASTING, INC.	File No. BPH-890921ML
PRAIRIE BROADCASTING, INC.	File No. BPH-890921MN
JONATHAN and MARY LYN WOLFERT, GENERAL PARTNERSHIP	File No. BPH-890921MR
HISPANIC COALITION, INC.	File No. BPH-890912MS
O'DAY BROADCASTING, INC.	File No. BPH-890912MZ
JOHN W. BARGER	File No. BPH-890912NC
MELANIE BRUTON	File No. BPH-890912NG

For Construction Permit for
New FM Station, Channel 227C2,
Haltom City, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1994; Released: June 3, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. A motion to dismiss the application of Madalina Broadcasting, Inc. was filed April 21, 1994 by Hispanic Coalition, Inc., which Madalina opposed.

2. In his *Initial Decision*, 8 FCC Rcd 6344 (1993) (*I.D.*), Administrative Law Judge Joseph Chachkin (ALJ) denied the application of Madalina. Madalina did not file exceptions to the *I.D.* or seek additional time to do so. A party invokes the Board's jurisdiction by timely filing exceptions pursuant to 47 CFR § 1.276(a). Any objection "not saved by an exception ... is waived." *Id.*, § 1.277(a).

3. Section 1.276(f) of the Commission's rules, 47 CFR § 1.276(f), provides that where an applicant "fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute." The Board has consistently dismissed applications pursuant to that provision, where parties have failed to file exceptions. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 832 ¶ 3(Rev. Bd. 1981) (subsequent history omitted); *see also Mark L. Wodlinger*, 3 FCC Rcd 698 (Rev. Bd. 1987) (counsel informed at oral argument that applicant he represented would not be deemed a party to existing proceeding where party did not file exceptions). Therefore, Madalina's application will be dismissed from this proceeding.

4. To the extent Madalina seeks to remain in this proceeding to participate in a settlement, we note the Board's admonition in *South Florida Broadcasting Company, Inc.*, 100 FCC 2d 973, 975 n.9 (Rev. Bd. 1985):

> [I]f the filing of an application purely for the purposes of extracting a settlement is prohibited, *see* 47 U.S.C. § 311(c)(3) (as amended by Pub. L. 97-259, 96 Stat. 1087, 1095, September 13, 1982), then the resurrection of a defunct application purely for such purposes may be no less a transgression.

5. ACCORDINGLY, IT IS ORDERED, That Hispanic Coalition, Inc.'s motion to dismiss IS GRANTED, and the application of Madalina Broadcasting, Inc. (File No. BPH-890921MB) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS	File No. BPH-880518MB
JOHN A. CAROLLO, JR.	File No. BPH-88051MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for
New FM Station, Channel 229A,
Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 1994; Released: June 3, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. On May 5, 1994, John A. Carollo, Jr., pursuant to 47 CFR 1.41, filed an informal request that the Review Board dismiss the application of Manzanita Media, Inc. On May 11, 1994, Manzanita opposed the dismissal motion, and on May 17, 1994, the third applicant in this proceeding, Lucinda Felicia Paulos, filed a pleading supporting the dismissal of Manzanita's application.

2. In a *Decision*, 8 FCC Rcd 8237, released November 26, 1993, we concluded that Carollo was the superior comparative applicant and denied the applications of Manzanita and Paulos. Manzanita did not file a petition for reconsideration with the Review Board pursuant to 47 CFR 1.106(f), nor did it file an application for review with the Commission pursuant to 47 CFR 1.115(d). Manzanita now states (Opposition, p. 4) that it did not use these available remedies to preserve its appellate rights because it was "trying to husband its resources, awaiting the outcome of" *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992).

3. Because Manzanita did not seek reconsideration of the Board's action or seek review from the Commission, the denial of Manzanita's application has become final by operation of law and it is entitled to no further consideration in this case. *See Jerome Thomas Lamprecht*, 7 FCC Rcd 6794 ¶ ¶ 3-4 (1993); *accord, Lynn Broadcasting*, FCC 94 I-044, released May 4, 1994. To the extent that Manzanita seeks to remain in the proceeding to participate in a possible settlement, we note the Board's admonition in *South Florida Broadcasting Company, Inc.*, 100 FCC 2d 973, 975 n.9 (Rev. Bd. 1985):

> [I]f the filing of an application purely for the purposes of extracting a settlement is prohibited, *see* 47 U.S.C. ¶ 311(c)(3) (as amended by Pub. L. 97-259, 96 Stat. 1087, 1095, September 13, 1982), then the resurrection of a defunct application purely for such purposes may be no less a transgression.

Thus, Manzanita's application may be deleted from the caption of this case, and Carollo's request will be dismissed as moot.

4. ACCORDINGLY, IT IS ORDERED, That the application of Manzanita Media, Inc. will be deleted from the caption of this case, and that John A. Carollo's informal motion to dismiss that application IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Association, Inc. — AAD 94-28

Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 1994; Released: May 27, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. The Commission established the USF in 1986.[1] The USF allows study areas with high loop costs to recover additional revenues from the interstate jurisdiction to offset intrastate costs. The objective of the Commission in establishing the USF was to preserve universal service by enabling high cost companies to establish local exchange rates that do not substantially exceed rates charged by other companies.

2. Section 36.611(a) of the Commission's Rules requires that local exchange carriers (LECs) file specific unseparated investment, expense, and loop count data with NECA on June 30 of each year. The purpose of these filings is to enable NECA to determine LEC eligibility for USF expense adjustment payments. These calculations are based on data for the period ending December 31 of the previous year. Section 36.613(a) of the Commission's Rules requires that NECA file unseparated loop cost data and the amount of high cost adjustment for each study area, a nationwide average unseparated loop cost, and the total nationwide amount of the expense adjustment with the Commission on September 1 of each year. Section 36.613(a) also requires that NECA file loop cost data, the dollar amount of USF expense adjustment, and the percentage of change for each study area for the previous five years.

3. Section 61.58(d)(2) of the Commission's Rules requires that tariff filings involving a change in rate structure or a rate increase must be made on at least 45 days' notice. Therefore, NECA files the new USF tariff rate, to be effective January 1, on approximately November 15 of each year. Section 1.773(a)(2)(ii) provides that petitions seeking suspension or rejection of a new tariff filing made on at least 45 days' notice will be filed and served within 15 days after the date of the tariff filing. As a result, interested parties have until approximately December 1 of each year to file their comments, effectively giving them from September 1 to December 1 to review and analyze NECA's USF filing.

4. On January 31, 1992, the National Exchange Carrier Association, Inc. (NECA) filed a "Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules for its 1992 and 1993 USF Data Submissions" ("1992 Petition"). Section 36.611(a) requires exchange carriers, that submit data to NECA for use in determining Universal Service Fund (USF) payments, to do so on or before June 30 of each year. Section 36.613(a) requires NECA to submit these data to the Commission on or before September 1 of each year. NECA's petition requested that these dates be changed to August 31 and November 1, respectively.

5. The Bureau granted that waiver request in part by extending the filing dates to July 31 and October 1, respectively for 1992 and 1993.[2] Those modified filing dates were chosen to strike a balance between permitting carriers and NECA to have a reasonable extension in filing time, while affording interested parties sufficient time to review data and file timely comments. The waiver was granted for 1992 and 1993.

6. On January 16, 1993 NECA filed a petition for waiver ("1993 Petition") seeking an extension of the 1992 and 1993 waiver until the USF proceeding is completed.[3] If the 1993 Petition were granted: (1) exchange carriers would be permitted to continue reporting USF data on July 31 rather than June 30; and (2) NECA would be permitted to file the required USF data with the Commission on October 1 instead of September 1. NECA also requests that the Commission consider changing these filing dates permanently in the USF proceeding.[4] We are granting this petition for the reasons that are stated below.

II. PLEADINGS

7. NECA states that the additional time provided, under the current waiver, for exchange carriers to submit data to NECA, significantly reduced the variance between the annual filing of the data and the update of that same data.[5] NECA asserts that the latest view of the national average cost per loop changed by only $.09 in the twelve months between the time it was initially submitted in 1992 and NECA's 1993 USF submission, as compared with changes of $.73 and $1.24 for the two years immediately preceding implementation of the current waiver. Changes in the national average cost per loop also result in changes in the

[1] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

[2] National Exchange Carrier Association, Inc. Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules, *Memorandum Opinion and Order*, 7 FCC Rcd at 3864 (Com. Car. Bur. 1992).

[3] *See generally* Amendment of Part 36 of the Commissions Rules and Establishment of a Joint Board, *Recommended Decision*, FCC 93J-3, released December 10, 1993 (Recommended Decision).

[4] *See* Amendment of Part 36 of the Commission's Rules and the Establishment of a Joint Board, *Notice of Proposed Rulemaking*, 8 FCC Rcd 7114 (1993).

[5] NECA comments at 2. Phrased somewhat differently, the increased time interval for filing cost studies has reduced the number of errors that are reported to NECA, and the number of errors that are reported to this Commission. *See id.*

USF expense adjustment amounts.[6] According to NECA the calendar year 1993 expense adjustment amount has varied only 0.1 percent from the level filed in NECA's 1992 annual USF data submission. NECA states that in each of the two years prior to implementation of the current waiver, the variance exceeded 2.5 percent, causing NECA to resize its 1993 rate levels to recover the additional expense adjustments.[7]

8. Based on the results of the temporary waiver, NECA expects that more accurate USF data will be available if the current waiver is extended. NECA states that the requested extension will also continue to reduce administrative burdens on exchange carriers, and lower the overall cost of USF data collections through the avoidance of additional revisions, data recompilations and analyses. Therefore, NECA requests that the Commission extend the current waiver of the USF reporting dates until the USF proceeding has been completed.

9. Five parties filed comments in support of NECA's request.[8] No party opposes NECA's request. GTE states that granting the petition would minimize the regulatory burden for all parties and improve USF data quality at the same time.[9] NTCA states that supporting data demonstrate only positive benefits resulting from the current waiver.[10] Century points out that the USF data filings have been more accurate under the existing waiver, thus saving time and resources for all concerned.[11] JSI echoes all of these sentiments and USTA urges the Commission to adopt the proposed filing dates permanently.[12]

10. Tallon, Cheeseman & Associates, Inc. (TCA) and Cathey, Hutton & Associates, Inc. (CHA) replied. Both of these parties concur with the commenting parties. In addition, they state that not only has the current waiver promoted efficiency and reduced costs, but that it has not harmed any party. They both support an extension of the current waiver and urge the Commission to adopt these USF filing dates as permanent.

III. DISCUSSION

11. We believe that NECA has shown good cause for extending the current waiver. Because the trial period has shown good results for all concerned parties, because no party has been harmed during that trial period, and because no party has objected to the granting of NECA's request, we are granting NECA's petition.

12. The date by which LECs must file USF data with NECA will continue to be July 31, and the date by which NECA must file USF data with the Commission will continue to be October 1. This filing schedule is to be continued, as NECA requested, until the USF proceeding is completed.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the National Exchange Carrier Association's Petition for Waiver of Sections 36.611(a) and 36.613(a) of the Commission's Rules IS GRANTED to the extent stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

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[6] 47 C.F.R. §36.612(a).
[7] NECA Petition at 3.
[8] Comments were filed by GTE Service Corporation, Inc. (GTE), National Telephone Cooperative Association (NTCA), Century Telephone Enterprises (Century), John Staurulakis, Inc. (JSI), and the United States Telephone Association (USTA).
[9] GTE Comments at 2.
[10] NTCA Comments at 2.
[11] Century Comments at 2.
[12] USTA Comments at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MCI
TELECOMMUNICATIONS
CORPORATION, *et al.*,
Complainants.

v.

GTE ALASKA INCORPORATED. File No. E-93-145

GTE CALIFORNIA INCORPORATED. File No. E-93-146

GTE FLORIDA INCORPORATED. File No. E-93-147

GTE NORTH INCORPORATED. File No. E-93-148

GTE NORTHWEST INCORPORATED. File No. E-93-149

CONTEL OF MAINE, INC. File No. E-93-154
d/b/a GTE MAINE
CONTEL OF NEW HAMPSHIRE, INC.
d/b/a GTE NEW HAMPSHIRE
CONTEL OF VERMONT, INC.
d/b/a GTE VERMONT
CONTEL OF WEST VIRGINIA, INC.
d/b/a GTE WEST VIRGINIA

CONTEL OF THE SOUTH, INC. File No. E-93-155
d/b/a GTE SYSTEM OF THE SOUTH
CONTEL OF KENTUCKY, INC.
d/b/a GTE KENTUCKY
CONTEL OF NORTH CAROLINA, INC.
d/b/a GTE NORTH CAROLINA
CONTEL OF SOUTH CAROLINA, INC.
d/b/a GTE SOUTH CAROLINA
CONTEL OF VIRGINIA, INC.
d/b/a GTE VIRGINIA

CONTEL OF ARKANSAS, INC. File No. E-93-156
d/b/a GTE ARKANSAS
CONTEL OF ILLINOIS, INC.
d/b/a GTE ILLINOIS
CONTEL OF INDIANA, INC.
d/b/a GTE INDIANA
CONTEL OF IOWA, INC.
d/b/a GTE IOWA
CONTEL OF KANSAS, INC.
d/b/a GTE SYSTEM OF IOWA
(FOR THE STATE OF IOWA), and
d/b/a GTE SYSTEM OF ARKANSAS
(FOR THE STATE OF ARKANSAS).
CONTEL OF MINNESOTA, INC.
d/b/a GTE MINNESOTA
CONTEL OF MISSOURI, INC.
d/b/a GTE MISSOURI
CONTEL OF NORTH DAKOTA, INC.
d/b/a GTE NORTH DAKOTA
CONTEL OF SOUTH DAKOTA, INC.
d/b/a GTE SOUTH DAKOTA

CONTEL OF THE NORTHWEST, INC. File No. E-93-157
d/b/a GTE SYSTEM OF THE NORTHWEST

CONTEL OF THE WEST, INC. File No. E-93-158
d/b/a GTE WEST

J.B.N. TELEPHONE COMPANY, INC. File No. E-93-159
d/b/a GTE TELEPHONE COMPANY

CONTEL TEXAS, INC. File No. E-93-160
d/b/a GTE TEXAS

ALSO KNOWN AS
GTE SYSTEM TELEPHONE COMPANIES, and

CONTEL OF CALIFORNIA. File No. E-93-161
Defendants.

ORDER

Adopted: May 25, 1994; Released: June 6, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 28, 1993, Wiltel, Inc. (Wiltel) filed the above-captioned formal complaints seeking damages from defendants with respect to defendants' alleged violations of the Commission's rate of return prescription for the 1989-1990 monitoring period.

2. The parties filed a joint motion to dismiss on April 28, 1994. In support of their motion, the parties state that they have reached a settlement which disposes of all issues and controversies in the above-captioned proceedings and request that the proceedings be dismissed with prejudice.

3. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

4. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed on April 28, 1994 IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Issuance of
Interpretive Ruling
Concerning FCC Form 395-B,
Broadcast Annual Employment Report

INTERPRETIVE RULING

Issued: May 27, 1994; Released: May 27, 1994

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. The Mass Media Bureau has before it a petition for an interpretive ruling regarding how the employees of radio station time brokers should be reported on the FCC Form 395-B, Annual Employment Report for broadcast stations.[1] The request was filed on May 2, 1994, by the law firms of Arent, Fox, Kintner, Plotkin & Kahn; Hardy & Carey; and attorney David Tillotson (the Firms).[2] The Firms allege that there are a variety of different factual situations involving time brokerage and different ways in which employees engaged in providing brokered services could be reported. They request that the Commission issue an interpretive ruling to clarify how employees in various situations should be reported.

II. PLEADINGS

2. The Firms describe several specific situations and ask how reports should be filed for each. In the first example, a broker is a licensee of another station in the same market as the brokered station to which the broker provides programming services. In this case, all employees are employed by the licensee-broker, but some employees' duties relate exclusively to the broker's station, some to the brokered station, and some to both stations. The Firms then analyze the merits of various reporting methods. In the second example, a broker is not a licensee of a station in the same market as the brokered station. Moreover, the broker may or may not be a Commission licensee. Again, while all employees are employed by the broker, their duties relate variably to the broker's station (in the case of licensee-brokers), the brokered station, or both. The Firms, as before, offer their analyses of various reporting methods. Finally, in a third example, the Firms ask how shared employees should be reported where stations in the same radio service are under common ownership or control in the same market, such as occurs where a licensee owns two FM stations in the same market.

III. DISCUSSION

3. In response to petitioners' request, this Interpretive Ruling sets forth general Commission policy on how to report employees on Form 395-B for broadcast stations involved in time brokerage arrangements. As a general matter, we believe that, consistent with the EEO Rule which measures licensee performance, employees hired in concert with time brokerages and LMAs should be reported on the Form 395-B submitted by the licensee that employs them. Thus, in the first example above, all employees hired and employed by the licensee-broker and whose duties include providing program services or other duties in support of the LMA should, as a general matter, be reported on the 395-B filed by the licensee-broker's station. This is because all such employees are either employed by, or under the control of, the licensee-broker. The licensee of the brokered station should file a Form 395-B for any employees it may retain or hire after commencement of the brokerage agreement.

4. In the second example above, whether the broker is a licensee or not, there is no cognizable brokerage agreement because the broker does not hold an interest in a station in the same market as the brokered station. *See* 47 C.F.R. Section 73.3555(a)(2)(i). However, where the broker is a licensee, the reporting requirements are, as a general matter, no different from the first example above. The licensee of the brokered station should file a Form 395-B for any employees it may retain or hire after commencement of the brokerage agreement. Similarly, the licensee-broker should file a Form 395-B for its employees. If personnel employed by the licensee-broker perform duties for both stations, the licensee-broker should report them on its Form 395-B. If the licensee-broker employs personnel to work at the brokered station, they should also be reported on the Form 395-B for the licensee-broker's station.

5. These policies are not inconsistent with prior Commission statements in *Policy Statement on Part-time Programming*, 82 FCC 2d 107, 115 (1980) (*Policy Statement*). The *Policy Statement* only considered whether employees of a non-licensee time broker should be reported by licensees selling blocks of their airtime to brokers. The Commission declined to require licensees of brokered stations to report employees of a non-licensee broker as part of the EEO employment profile. Our ruling here merely indicates that, as a general matter, time brokers who are themselves licensees should report individuals under their employ, whether they work at the licensee-broker's station or a station operated by the broker under an LMA. The two rulings are, therefore, fully consistent. In addition, the

[1] Time brokerage is defined in 47 C.F.R. Section 73.3555(a)(3)(iv) of the Commission's rules as "the sale by a licensee of discrete blocks of time to a 'broker' that supplies the programming to fill that time and sells the commercial spot announcements in it." A *cognizable* time brokerage agreement (often referred to as a "Local Marketing Agreement" or "LMA") is a time brokerage agreement between two broadcast licensees of stations whose principal community contours overlap and under which more than 15% of broadcast time per week of one station is brokered by the other station. If a brokerage agreement is entered into by (1) a licensee and a non-licensee broker or (2) between two licensees in separate markets, the agreement is not cognizable under Commission rules. *See* 47 C.F.R. Section 73.3555(a)(2)(i).

[2] In addition, the National Association of Broadcasters filed a Statement on May 5, 1994, in support of the Firms' petition.

Policy Statement was directed at the typical time brokerage existing in 1980, which involved the brokerage by non-licensees of short, discrete periods of broadcast time. The more common practice today is for large blocks of time or the entire programming schedule of a station to be brokered. When that practice is engaged in by a licensee-broker, we believe it generally appropriate that the licensee-broker comply with the EEO Rule and its attendant reporting obligations.

6. In accordance with the reasoning set forth in *Policy Statement*, if the broker is not a licensee, as in the second example above, the broker is not required to file a Form 395-B. However, we will closely watch to see that such agreements are not used to circumvent our EEO Rule and policies.

7. Turning to the third example outlined by petitioners involving the reporting of shared employees of commonly owned stations in the same radio service in the same market, current data processing technology available to the Commission does not allow for the employment profile of more than one station to be reported on the same Form 395-B except in cases involving an AM/FM combination. Therefore, if a licensee owns two FM stations or two AM stations in the same market, the licensee should file a separate report for each station, dividing employees between the stations according to their primary duties. If the duties of one or more employees involve work for both stations equally the licensee should file a Form 395-B for one station with all employees from both stations listed. It should then file a separate Form 395-B for the other station explaining that the station's employees are reported on the Form 395-B filed for the licensee's other station in the same market. We expect the licensees of multiple stations in the same market to file the Form 395-B attributing employees to the stations according to the manner in which the stations operate.

IV. CONCLUSION

8. Accordingly, IT IS ORDERED that this Interpretive Ruling IS ISSUED, to be effective upon publication in the Federal Register.[3]

9. IT IS FURTHER ORDERED that the May 31, 1994, due date for the filing of 1994 Form 395-B IS EXTENDED for those affected by this Interpretive Ruling until 30 days after publication of this Interpretive Ruling in the Federal Register. Licensees who have already filed their 1994 Form 395-B may amend them prior to that date.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[3] *See* 5 U.S.C. Section 553(d)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released Date: June 6, 1994

BORDER TO BORDER COMMUNICATIONS, INC. FILED A PETITION FOR WAIVER OF SECTIONS 36.611 AND 36.612 "UNIVERSAL SERVICE FUND" OF THE COMMISSION'S RULES AAD 94-61

Comment Date: June 17, 1994
Reply Date: July 5, 1994

On May 5, 1994, Border to Border Communications, Inc. (BBC) filed a petition for waiver of Sections 36.611 and 36.612. This waiver would permit BBC to receive USF support for a one-year period beginning April 2, 1994 and ending March 31, 1995; and would direct the National Exchange Carrier Association, Inc. to make payments to BBC using current, rather than historical, data.

Under the existing rules, eligibility for USF payment is determined on the basis of historical information. However, as a new exchange carrier, BBC has no historical cost information. As a consequence, a literal reading of the Commission's rules would preclude BBC from receiving USF payments until 1996, when historical data would then be available. BBC requests that this waiver be granted to permit it to use current data rather than historical data for USF reporting purposes for the period of April 2, 1994 through March 31, 1995.

Interested parties may file comments on BBC's petition on or before **June 17, 1994,** and reply comments on or before **July 5, 1994,** with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-61. Four (4) copies should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service records duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. 20554; copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 20, 1994

Commission Seeks Comment on CMRS Spectrum Aggregation Cap in GN Docket No. 93-252

In the *Further Notice of Proposed Rule Making* in Gen. Docket 93-252 (FCC 94-100) released today, the Commission is seeking comment on imposing a limit on the amount of spectrum CMRS licensees may acquire in geographic markets. A proposal for a CMRS spectrum aggregation cap was not originally included in the *Further Notice* adopted by the Commission at the April 20, 1994 meeting. On reconsideration on its own motion, the Commission decided on May 19, 1994 to seek comment on the issue in the *Further Notice*, which is also soliciting comment on the technical, operational and licensing rules that should apply to CMRS licensees.

In the *Further Notice*, the Commission observes that aside from the restrictions placed on the aggregation of broadband PCS spectrum in Gen. Docket No. 90-314 (which limit PCS licensees to 40 MHz of spectrum in a licensing area and restrict cellular licensees from acquiring PCS spectrum), there is no general cap on the amount of spectrum that an entity may use to provide CMRS. The Commission notes that large amounts of spectrum are now available for CMRS use and that CMRS will operate in a flexible regulatory environment that permits licensees to offer a diverse array of mobile services. The Commission expresses concern that CMRS licensees able to acquire large amounts of spectrum in a given area could exert excessive market power that would affect competition not only within specific CMRS service categories but also in CMRS generally.

The Commission seeks comment on general spectrum cap alternatives, but indicates that the limit should approximate the total amount of spectrum that can be held by a single licensee under our combined broadband and narrowband PCS allocations. The Commission tentatively concludes that the 40 MHz limit on broadband PCS aggregation provides a reasonable basis for calculating a general CMRS cap, but that the cap should also be adjusted upward slightly to provide PCS licensees and other existing mobile service providers with the flexibility to offer both broadband and narrowband services. The Commission also solicits comment on whether all CMRS spectrum should be included for purposes of calculating a cap. In particular, the Commission questions whether the cap should be limited to broadband services, *i.e.*, cellular, broadband PCS and SMR.

Additionally, the Commission in the *Further Notice* asks for comment on how to define the geographic service areas in which the cap would apply. The Commission proposes an approach that uses Rand McNally's Major Trading Area (MTA) or Basic Trading Area (BTA) definitions as utilized in the PCS proceeding, but seeks comments on other alternatives as well. The Commission further asks for comment on the percentage ownership interest that an individual or entity may hold in a CMRS before it is attributed to that entity for purposes of a spectrum cap. The Commission tentatively proposes that all ownership interests of 5 percent or more be attributed for application of the spectrum cap. In addition to ownership attribution, the Commission seeks comment on the amount of geographic overlap that must occur between the designated geographic area and a CMRS before a spectrum cap is triggered. The Commission tentatively proposes that a CMRS licensee serving 10 percent or more of the population in a designated area should be subject to the spectrum cap in that area for purposes of further licensing.

The Commission also asks about the treatment of minorities, women, rural telcos and small businesses under the cap, and questions whether the spectrum limit or ownership attribution level should be higher for these entities. Finally, the Commission solicits comments on several other issues, including the collection of ownership and service area information and whether "grandfathered" Part 90 licensees who will be treated as PMRS providers until August 10, 1996 should be subject to a CMRS spectrum cap before the expiration of the transition period.

Any questions on the CMRS spectrum aggregation cap, or the *Further Notice* generally, should be addressed to David Furth or Kathleen O'Brien Ham, Land Mobile and Microwave Division, Private Radio Bureau, at (202) 634-2443 or Nancy Boocker, Mobile Services Division, Common Carrier Bureau (202) 632-6450.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-403

In re Application of

EVANSVILLE SKYWAVE, INC. File No. BPH-870430OK

For Construction
Permit for a New FM
Station on Channel 298A
at Evansville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 6, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. This memorandum opinion and order denies review of a decision of the Review Board denying the application of Evansville Skywave, Inc. (Skywave) for a new FM radio station in Evansville, Indiana. *Evansville Skywave, Inc.*, 8 FCC Rcd 7009 (Rev. Bd. 1993).[1]

I. BACKGROUND

2. Skywave is the only applicant remaining in what was originally a seven-party comparative proceeding. Skywave has a single voting stockholder, Sondra Matthews (25 percent equity interest), and a single nonvoting stockholder, Skywave Communications Corporation (SCC) (75 percent equity interest). SCC's president, Lee R. Perkinson played a key role in organizing Skywave.

3. On February 28, 1992, the Commission reversed a Board decision that had disqualified Skywave for allegedly misrepresenting the validity of its organization as a two-tiered corporation. *Evansville Skywave, Inc.*, 7 FCC Rcd 1699 (1992). The Commission did not reach the question of whether, as the Board found, Perkinson rather than Matthews actually controlled Skywave, since the record did not indicate that Skywave had misrepresented or concealed the nature of the two principals' participation. Accordingly, the Commission remanded this proceeding to consider previously mooted questions regarding Skywave's financial qualifications.

II. PROCEEDINGS ON REMAND

4. After further hearings, Administrative Law Judge Edward J. Kuhlmann concluded that Skywave failed to demonstrate that it had reasonable assurance of the funds needed to construct and operate the Evansville facility. *Evansville Skywave, Inc.*, 8 FCC Rcd 26 (I.D. 1992). Skywave relied on an April 27, 1987 letter from Bank One, Indianapolis, indicating the bank's willingness to lend Skywave up to $400,000 (increased to $450,000 by a subsequent letter). The ALJ found that this letter was inadequate to establish Skywave's financial qualifications.

5. According to the ALJ, the letter had resulted from an agreement between Perkinson and Bank One vice president, Anthony P. Schlichte, made before Perkinson had even decided in which communities to file applications. (SCC-affiliated applicants eventually filed in ten communities). 8 FCC Rcd at 30 ¶ 33. The ALJ found that Schlichte provided the same form letter for each SCC applicant without making any assessment of the viability or the creditworthiness of the borrower. *Id.* In particular, the ALJ found that the record did not demonstrate that Matthews, who supposedly arranged for the Skywave letter, sent any relevant financial data to Bank One about herself or about Skywave's proposal. *Id.* at 30 ¶ 27. In this regard, the ALJ rejected Matthew's testimony as unreliable and lacking in candor. *Id.* at 29 ¶ ¶ 24-25.

6. The Board affirmed the conclusion that Skywave was not financially qualified (8 FCC Rcd at 7011-12 n.6) and concluded that Skywave should be disqualified for misrepresentation and lack of candor. *Id.* at 7018-19 ¶ ¶ 17-18. The Board found that: (1) Matthews falsely testified that she submitted a personal financial statement to Schlichte before he issued the 1987 letter (*Id.* at 7012-15 ¶ ¶ 8-10); and (2) Matthews testified falsely about a "sample letter" that she supposedly sent to Schlichte. *Id.* at 7015-18 ¶ ¶ 11-16.

III. FINANCIAL QUALIFICATIONS

7. In its application for review, Skywave stresses that Schlichte issued the letter based on his familiarity with the substantial financial resources of individual SCC stockholders. In this regard, Skyway observes that Bank One had previously made and serviced a loan to Midwest Mobilephone, which was owned by several of the same stockholders as SCC. Skywave claims that the letter was an arm's length transaction in compliance with the bank's ordinary credit policies.

8. We agree with the ALJ and the Board that the 1987 letter did not provide reasonable assurance of a loan. We find that the letter does not reflect any individualized consideration of Skywave's proposal by the bank. In this regard, the record does not support Perkinson's testimony that, with respect to the SCC proposals: "Mr. Schlichte did [not] give me a carte blanche; I always understood that the bank would examine each situation to be sure it was willing to make a loan." Skywave Exh. 3 at 8. Similarly, the record does not support Matthews' testimony that she "arranged for" the loan. Tr. 215.

[1] The Commission has before it an Application for Review, filed October 4, 1993, by Skywave (erratum October 20, 1993), and an opposition filed October 19, 1993 by the Mass Media Bureau.

9. Schlichte's own testimony indicates to the contrary that he did not specifically examine the Evansville proposal and that Matthews did not "arrange for" the loan. Schlichte explained that he issued the letter based primarily on his familiarity with SCC's principals and not on an assessment of the proposed Evansville facility or on the financial position of the local stockholder (*i.e.*, Matthews). Tr. 292-93; Skywave Exh. 4 at 4 ¶ 8. Instead, Schlichte reserved the right to review detailed financial information regarding the project and its principals at the time a formal loan application would be made. Skywave Exh. 4 at 4 ¶ 8. He stated that the letter indicated that a loan would likely be made only "upon favorable review of financial information." Tr. 292. Schlichte admitted that he was not even aware of how the Evansville facility would be owned after it went on the air. Tr. 289. Schlichte testified that the letters he issued to the SCC applicants were based on a single "prototype letter." Skywave Exh. 4 at 3 ¶ 6. Thus, as the ALJ found, Schlichte disclosed that the Evansville letter reflected an agreement between Perkinson and Schlichte made before Schlichte even heard of the Evansville applicant and not on any particularized consideration of the Evansville proposal.[2]

10. In particular, the record provides no basis to conclude that the letter reflected any meaningful contact between Matthews and Schlichte. Indeed, Schlichte could not specifically recall being approached by Matthews (although he stated that it was customary for the local SCC principal to contact him). Skywave Exh. 4 at 3-4 ¶ 7. Matthews' testimony concerning the amount of the loan provides a telling example of the nature of her participation. Matthews estimated that the cost of construction and initial operation of the station would be $250,000. Skywave Exh. 2 at 1. The letter specifies a loan of $400,000, an amount 60 percent greater. Skywave Exh. 2, Att. C. Matthews gave no coherent account of how the $400,000 amount of the loan came to be specified in the letter. She initially testified that she asked Schlichte for $300,000 and could not explain why the letter specified $400,000. Tr. 332, 346. Matthews then testified that she could not recall specifying the amount of the loan to Schlichte either orally or in a "sample" loan letter. Tr. 350. Subsequently, she stated that she recalled inscribing the $300,000 figure by hand in a sample letter given to her by Perkinson and that she probably increased the figure to $400,000 when she retyped the letter and sent it to Schlichte. Tr. 354.[3] (At that point she testified that she could not recall her previous testimony that she did not know whether she filled in the amount.) Still later, however, she indicated that the letter she sent to Schlichte was a composite and not based on a single sample and that she could not recall when she increased the figure from $300,000 to $400,000. Tr. 357.

11. Matthews' testimony about the reason for the $150,000 cushion over the amount of the estimated costs is also unconvincing. Matthews explained that the $400,000 was intended to cover prosecution expenses as well as construction and operation costs, but she admitted that she did not discuss this with Schlichte. Tr. 348-49. The letter refers only to construction and operation costs. Skywave Exh. 2, Att. C. Matthews later testified that the $400,000 figure was chosen in part because "banks don't always give you what you ask for." Tr. 358. Yet Matthews reports no discussions with the bank before it issued the letter specifying that amount and stated that she was nonetheless not surprised that the letter specified $400,000. Tr. 359. We agree with the ALJ that Matthews' testimony with regard to these matters is so contradictory and transparently result-oriented that it provides no basis to find that any meaningful contact between Matthews and Schlichte occurred.[4]

12. Another point also illustrates the lack of meaningful contact. Schlichte testified that the bank would likely require both the SCC principals and Matthews to guarantee any loan. Tr. 285-86, 289-90. The bank letter, however, made no mention of any guarantees. Skywave Exh. 2, Att. C. Moreover, Matthews sent no personal financial statement to Schlichte.[5] Tr. 341. Perkinson also confirmed that he and other SCC stockholders submitted no financial information in connection with the Skywave letter, although he believed that the bank had information in connection with the earlier Midwest Mobilephone loan.[6] Tr. 260-61; Skywave Exh. 6 at 1-3.

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[2] Schlichte's testimony distinguishes this case from *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978). In *Multi-State*, the court held that the Commission erred in finding that a banker's testimony rebutted the conclusion that a bank letter reflected the bank's present firm intention to make a loan. 590 F.2d at 1120. Schlichte's testimony, by contrast, has precisely that effect, since it indicates that he had given no particularized attention to Skywave's proposal at the time he issued the letter.

[3] Matthews' testimony concerning the sample letter is also contradictory. Matthews' first testified that a letter attached to Skywave Exh. 5 was the sample letter and that she had a copy of it in her files. Tr. 322. Matthews then admitted that she had no copy of the letter in her files and that she merely assumed that the attachment, which she obtained from her attorney, was the sample letter. Tr. 334, 350-53. Matthews seemed to indicate that she was aware of only a single sample letter from Perkinson. Tr. 354-55. Then, almost immediately, she claimed that she had two sample letters and that the sample she sent to Schlichte was a composite that she prepared from the two. Tr. 355-56. Matthews testified that the letter Schlichte prepared was like the sample she sent him. Tr. 357, 364. Schlichte, however, testified that he used the same prototype letter for all of the SCC applications. Skywave Exh. 4 at 3 ¶ 6. Schlichte had no record of receiving a sample letter from Matthews and could not recall receiving any. Tr. 288-89; Skywave Exh. 5 at 2.

[4] Thus, this case resembles *Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314 (Rev. Bd. 1990), which also involved Schlichte and an SCC applicant. There, the Board found that the underlying record and particularly the testimony of the applicant's general partner "laid bare" substantial and material questions as to the substance behind the applicant's bank letter. 5 FCC Rcd at 6322 ¶ 37. By contrast, in *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161 ¶ 13 (Rev. Bd. 1990), the Board found that no evidence had been brought forward to indicate that the letter there involved was not valid or an "accommodation letter" and thus there was no reason to question the validity of the letter on its face.

[5] Matthews' testimony on this point was inconsistent. She stated at one point that she had sent a personal financial statement to Schlichte. Tr. 225. She subsequently recanted that testimony. Tr. 341; Skywave Exh. 5 at 2.

[6] Perkinson explained that 19 of the 20 SCC stockholders were owners of Midwest Mobilephone. The Midwest Mobilephone loan was made in 1983 and was outstanding until April, 1986. Skywave Exh. 4 at 2 ¶ 3; Skywave Exh. 6 at 1-2, Att. Perkinson stated that the financial information submitted to the bank in connection with the Midwest Mobilephone loan had probably been updated at least every year. Tr. 260. As noted, the bank issued the Skywave letter on April 27, 1987. Thus, the bank had not reviewed the financial standing of the SCC principals for at least one and possibly more years.

13. Indeed, the ALJ found that the record did not support Matthews' claim that she sent any information to Schlichte before he issued the letter. The ALJ's finding is supported by his adverse credibility findings about Matthews' testimony, which are entitled to great weight. *See WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). Moreover, as noted above, Schlichte had no record of receiving any information from Skywave and could not recall receiving any, and neither Matthews nor Skywave's attorneys could produce a copy of the submission supposedly made to the bank.

14. We conclude that Skywave's bank letter did not meet the Commission's established criteria for demonstrating reasonable assurance as noted in *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 ¶12 (Rev. Bd. 1990). Skywave, the prospective borrower (unlike its passive investors), did not have a long and established relationship with the bank. Nor did Skywave provide the bank with the kind of information on which the bank could decide that a loan would be forthcoming. In the absence of such a showing, the letter is insufficient to establish Skywave's financial qualifications, and this circumstance, standing alone, warrants the denial of Skywave's application.

IV. MISREPRESENTATION AND LACK OF CANDOR

15. As noted above, the Board's finding that Matthews committed disqualifying misrepresentation and lack of candor concerned the deficiencies that the ALJ found in her testimony about the information she supposedly submitted to Schlichte. The ALJ found that her testimony that she sent Schlichte a personal financial statement (note 5 *supra*), a matter obviously relevant to the question of whether the bank had a basis on which to make a bona fide loan commitment, was deliberately false. This finding was deemed particularly compelling due to the fact that Matthews' specific claim that she submitted a financial statement was a repetition and clarification of previous answers in which she stated that she had provided financial information about herself to Schlichte before the bank's issuance of the 1987 loan letter.[7] 8 FCC Rcd at 29 ¶ 23. Tr. 216-17. He also faulted her inconsistent testimony concerning the "sample letter" (note 3 *supra*), which Skywave had submitted as part of an exhibit intended to "address the questions raised by the Review Board about what information [Matthews] provided to Bank One prior to the issuance by Mr. Schlichte of a financing letter in April, 1987." Skywave Exh. 5 at 1. He found that the testimony was unreliable and lacking in candor and that the inconsistencies in her testimony reflected an attempt to testify to whatever would best serve her interests. *Id.* at 29 ¶ ¶ 24-25.[8] The Board concluded that such a "pattern of lack of candor, evasiveness, and outright misrepresentation" constituted disqualifying misconduct. 8 FCC Rcd at 7018 ¶17 . In this regard, the Board held that the findings of the ALJ, who observed the witnesses, were entitled to great weight.

16. Skywave challenges the Board's finding that Matthews made disqualifying misrepresentations. According to Skywave, the statements criticized by the Board merely reflect Matthews' confusion over trivial matters and not any intent to deceive.

17. Skywave attributes the false impression left by Matthews' testimony, that she had submitted a personal financial statement to Schlichte before he issued the 1987 letter, as a result of an innocent misunderstanding. Skywave explains that, during a recess in the hearing, Matthews, in discussing the matter with her attorney, realized that she had mistakenly interpreted the question as asking whether she had submitted a financial statement at any time, not whether she had submitted one prior to the original letter. *See* Tr. 343-44; Skywave Exh. 5 at 2-5. Skywave complains that the ALJ did not recognize that Matthews attempted to correct her testimony immediately after the recess. *See* Tr. 277, 344. Skywave observes that earlier, in a deposition, Matthews acknowledged that she sent no personal financial statement to Schlichte. Bureau Exh. 1 at 106, 110. (However, as discussed in note 7, *supra*, we find that the ALJ's point is supported by the record).

18. Skywave maintains that the details of how Matthews prepared the sample letter she sent to Schlichte are immaterial and that Matthews had no motive to deceive in this matter. Skywave contends that Matthews simply forgot the precise sequence of events until her memory was jogged by cross-examination.

19. The Mass Media Bureau responds that Matthews' testimony was blatantly false and deceptive and that it is disqualifying whether or not it involved a material subject.

20. We agree with the Board that this case is governed by *Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992). There we concluded that an applicant was disqualified where an ALJ found that the applicant's testimony before him was pervasively lacking in candor, despite the fact that the particular discrepancies and evasions taken individually might not have been disqualifying. 7 FCC Rcd at 1585 ¶ 9. The ALJ here made a determination that Matthews' testimony pervasively lacked candor, was utterly unreliable, and that it was result-oriented and not the product of

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[7] In this regard, the ALJ found that "[f]rom the presiding officer's observation of Matthews, it is obvious that she understood the question, the reason for the question, and she deliberately gave the disputed answers. . . . Matthews was repeatedly given an opportunity to correct her answer and she did not. 8 FCC Rcd at 29 ¶23 . Accordingly, the ALJ gave no weight to Skywave's contention that afterwards it attempted to correct the testimony when Matthews realized, during a discussion with counsel, that she had misunderstood the question. The ALJ dismissed this attempt as "no more than an effort to make her testimony consistent with Perkinson['s] and Schlichte's. *Id.* Skywave contends that this finding is unwarranted because Perkinson and Schlichte had not yet given any contradictory testimony. While Skywave is correct that the other witnesses had not yet given their contradictory testimony, Matthews' recantation nevertheless reflects that she became aware of that her testimony was insupportable. Specifically, she admits that she recanted her testimony because her attorney pointed out that it contradicted her own previous deposition testimony. Skywave Exh. 5 at 3. *See* Bureau Exh. 1 at 106, 110. Thus, the ALJ's point remains valid.

[8] As a subsidiary matter, the ALJ criticized, as lacking in candor, Matthews' testimony in response to the ALJ's questions about whether she had previous experience in dealing with banks. The ALJ found that she initially testified that she had borrowed money to buy a house but then (after being asked what information she had to supply the bank) inconsistently admitted that, as far as the bank was concerned, her mother not she was the borrower. 8 FCC Rcd at 29 ¶ 25. *See* Tr. 335-37.

confusion or innocent error. As the discussion above indicates, that finding is entitled to great weight and is consistent with the record as a whole.

21. We reject Skywave's reliance on *Garrett, Andrews & Letizia, Inc.*, 49 RR 2d 1001, 1007 ¶ 18 (Rev. Bd. 1981), and *Fox River Broadcasting, Inc.*, 50 RR 2d 1321, 1324-25 ¶ 6 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983), for the proposition that misrepresentation cannot be found in the absence of material misstatement, intent to deceive, or logical reason to deceive. Here the ALJ specifically found that Matthews' misstatements were deliberately deceptive. Moreover, while the issue of what information Matthews' submitted to Schlichte is of relatively minor importance, it is nonetheless material to Skywave's attempts to demonstrate that Schlichte had a reasonable basis on which to issue the letter. The pervasive nature of the lack of candor found demonstrates that Matthews cannot be relied on as a Commission licensee. Thus, the fact that Matthews attempted to correct part of her testimony and that the specific evasions found involved matters of relatively little significance do not provide mitigating circumstances warranting any modification of the result in this case.

V. ORDERS

22. ACCORDINGLY, IT IS ORDERED, That the Application for Review, filed October 4, 1993, by Evansville Skywave, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 31, 1994

Released: June 7, 1994

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Journal Broadcasting 1800E
of New Mexico, Inc.
Licensee, KASA-TV
1377 University Blvd., N.E.
Albuquerque, New Mexico 87102

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fifteen thousand dollars ($15,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by § 0.283 of the Commission's Rules, for repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In response to the Children's Television Act of 1990, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). *Children's Television Programming*, 6 FCC Rcd 2111, 2118 *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992.

On June 1, 1993, you filed an application for renewal of license (FCC Form 303-S) for KASA-TV, Santa Fe, New Mexico (BRCT-930601KM). In Exhibit No. 1 to a supplement to FCC Form 303-S, you provided information concerning your efforts at compliance with the limitations on commercial matter during children's programming during your last license term. As you stated, prior to acquiring and activating KASA-TV (formerly KKTO-TV) on Channel 2 in Santa Fe, you were the licensee of KGSW-TV, Channel 14, in Albuquerque. As a condition of being allowed to acquire KASA-TV, you surrendered the license for KGSW-TV in May of 1993. You indicated that there have been no commercial overages on KASA-TV since you acquired the station, but that there were eight instances of program-length commercials on KGSW-TV during its last license term while you were the license. While it is true that you are not seeking the renewal of license for KGSW-TV, this is so only because you were permitted to upgrade your facilities by acquiring KASA-TV. Under these circumstances it is appropriate to consider your operation of KGSW-TV.

You claimed that each of the program-length commercials was caused by an inadvertent human error. For instances, six of the program-length commercials occurred during "G.I. Joe" because a spot order did not indicate that it mentioned a product related to the show. Another program-length commercial occurred because a "make-good" commercial was inserted in a show and the commercial description did not indicate that it depicted a product related to a show. The last program-length commercial occurred because the commercials for a new show were not promptly pre-screened for character likenesses. Moreover, you indicated that KGSW-TV carried, and now KASA-TV carries over 43 hours of children's programming per week. Thus, the chances for mistakes are great. Finally, you stated that you have learned from your mistakes, that you have adopted procedures to avoid future commercial overages and that you have not had any commercial overages since you began operating on Channel 2.

Your record of exceeding the Commission's limits on commercial matter during children's programming by airing eight program-length commercials constitutes a willful and repeated violation of § 73.670 of the Commission's Rules. Accordingly, pursuant to § 503(b) of the Communications Act, Journal Broadcasting of New Mexico, Inc., is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of fifteen thousand dollars ($15,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in § 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. The eight program-length commercials clearly indicate that you did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented you from complying with the commercial limits during your license period. Instead, the violations appear to result from the failure to implement adequate compliance procedures. Under these circumstances an upward adjustment of $5,000 is warranted.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosures
cc: William H. Fitz, Esquire

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 31, 1994

Released: June 7, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mountain States Broadcasting, Inc. 1800E
Licensee, KMSB-TV
1855 N. Sixth Avenue
Tucson, Arizona 85705

Dear Licensee:

This leter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of fourteen thousand dollars ($14,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, for repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

When Congress adopted the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b and 394, it required the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children's programming and to consider in its review of television license renewals the extent to which the licensee has met the commercial limits. The Commission adopted policies and regulations to implement Congress' mandate in *Children's Television Programming*, 6 FCC Rcd 2111, *recon. granted in part*, 6 FCC Rcd 5093 (1991). Among the regulations adopted was 47 C.F.R. Section 73.670, which provides that:

> No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

These commercial limitations became effective on January 1, 1992. *Children's Television Programming*, 6 FCC Rcd 5529 (1991).

On June 1, 1993, you filed an application for renewal of license (FCC Form 303-S) for KMSB-TV, Tucson, Arizona (BRCT- 930601KO). You also filed a supplement to FCC Form 303-S which contains questions to determine whether the licensee has complied with the limits on commercial matter as set forth in 47 C.F.R. Section 73.670. In this supplement, you indicated that KMSB-TV had not complied with the limitations on commercial matter during children's programming during your last license term. Moreover, you attached, as Exhibit No. 2, an explanation of your non-compliance.

You indicated that from January 1992, through December 1992, KMSB-TV exceeded the commercial limits during children's programming on 45 occasions. One commercial overage was 75 seconds in length, 17 commercial overages were 60 seconds in length, one commercial overage was 40 seconds in length, and 26 commercial overages were 30 seconds or less in length. You indicated that you formatted your children's programming to comply with the commercial limits by programming your computer to limit the amount of commercial time available for use. However, you claimed that apparently the children's shows in the 3 to 4 PM weekday clock hour were improperly programmed. Thus, commercial overages repeatedly occurred during that time period and, later, during another time period when one of the shows was moved to another time period. You claimed that the overages were discovered in April 1993, and that corrective actions were taken to ensure future compliance.

Your record of exceeding the Commission's limits on commercial matter during children's programming on 45 occasions during your license period after these limits became effective, constitutes a repeated rule violation. Accordingly, pursuant to Section 503(b) of the Communications Act, Mountain States Broadcasting, Inc., is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of fourteen thousand dollars ($14,000) for its apparent repeated violation of 47 C.F.R. Section 73.670. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. An upward adjustment of the base forfeiture amount may be warranted under established criteria such as prior violations, egregious misconduct or when the violation is repeated or continuous. In determining the appropriate forfeiture amount for this violation of the commercial limits during children's programming, we have taken into consideration several factors of particular importance. We have considered the number of instances of commercial overages and the length of each overage. We have also considered the period of time over which such overages occurred. In addition, we have considered whether or not the licensee established an effective program to monitor compliance. Finally, we have considered other violations of the Commission's rules limiting commercial matter during children's programming involving the licensee and other commonly-owned licensees.

The 45 occasions on which you repeatedly exceeded the Commission's limits on commercial matter during children's programming is a significant number of violations. While you claim to have established procedures for ensuring compliance with the commercial limits, those procedures did not preclude a significant number of overages. Moreover, these overages were not detected by you until April 1993, at which time you received notice that another station that you programmed in Tucson pursuant to a time brokerage agreement was exceeding the Commission's commercial limits. At that time, you examined your past performance and changed your certifications in your public file which, until that time, had indicated compliance with the commercial limits.

When the Commission delayed the effective date of 47 C.F.R. Section 73.670 until January 1, 1992, we stated that, "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented Station KMSB-TV from complying with the children's advertising limitations during your license period. Indeed, apparently you did not have a procedure in place for monitoring compliance with the Commission's commercial limits. The fact that now you may have implemented a plan to eliminate future commercial overages does not relieve you of liability for prior violations. *See International Broadcasting Corp.*, 19 FCC 2d 793 (1969). Moreover, we also note that pursuant to a time brokerage agreement you provided the programming to KTTU-TV, another Tucson television station, which contained commercial matter greatly in excess of the Commission's commercial limits. Finally, commercial overages sufficient to warrrant a monetary forfeiture were reported in connection with the license renewal application of KASA-TV, Santa Fe, New Mexico, a station with the same corporate parent as KMSB-TV. Consideration of these factors warrants an upward adjustment of four thousand dollars.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosures
cc: William H. Fitz, Esquire

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 31, 1994

Released: June 7, 1994

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Scripps Howard Broadcasting Company 1800E
Licensee, KNXV-TV
4625 S. 33rd Place
Phoenix, Arizona 85040

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by § 0.283 of the Commission's Rules, for repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In response to the Children's Television Act of 1990, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). *Children's Television Programming*, 6 FCC Rcd 2111, 2118 *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992.

On June 1, 1993, you filed an application for renewal of license (FCC Form 303-S) for KNXV-TV, Phoenix, Arizona (BRCT-930601KR). In a supplement to FCC Form 303-S you indicated that KNXV-TV had complied with the limitations on commercial matter during children's programming during your last license term. However, in Exhibit 3 to your application, you indicated that you had aired program-length commercials on five occasions. You claimed that each of the overages was an isolated instance of human error that occurred inadvertently. For instance, one occurrence involved a commercial for Kellogg's Frosted Flakes that contained an offer for a free character from the show "Ducktails" which aired during the "Ducktails" show. You stated that while your staff had identified this commercial as being inappropriate during this show, it aired because it was a barter spot built into the show. The other four instances occurred because your traffic department did not recognize commercials for Mattel Inc.'s "Hook" toy as being related to the show "Peter Pan and the Pirates." You stated that all of these instances occurred in January and February of 1992, and that you have taken appropriate actions to preclude any future such occurrences.

Your record of exceeding the Commission's limits on commercial matter during children's programming by airing five program-length commercials during your license period, constitutes a willful and repeated violation of § 73.670 of the Commission's Rules. Accordingly, pursuant to § 503(b) of the Communications Act, Scripps Howard Broadcasting Company, is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of ten thousand dollars ($10,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in § 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. The five program-length commercials clearly indicate that KNXV-TV did not initially establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming*, 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented KNXV-TV from complying with the commercial limits during your license period. Instead, the violations appear to result from the failure to initially implement adequate compliance procedures. Under these circumstances no upward or downward adjustment to the base forfeiture amount is warranted.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3).

Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Enclosures
cc: Donald Zeifang, Esquire

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia Inc. against Tele-Media Corp.

CSR-4058-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; **Released: June 7, 1994**

By the Chief, Cable Services Bureau

1. On June 29, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that Tele-Media Corporation ("Tele-Media") had declined to carry the station even though Philadelphia is within fifty miles of the system's headend at Chesapeake City, Maryland, and it is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) [1992 Cable Act]. No opposition to this petition has been filed.

2. Station WYBE's petition establishes that it is entitled to carriage on the Chesapeake cable system, and it has requested carriage of its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed June 29, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with §615(j) (3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Tele-Media Corporation IS ORDERED to commence carriage of Station WYBE forty-five days (45) from the release of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] Although WYBE's petition was originally filed on June 29, 1993, it was not perfected and accepted for filing until September 9, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Independence Public Media of Philadelphia Inc. against TCI Cablevision of Maryland	CSR-4059-M MD00047

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: June 7, 1994

By the Chief, Cable Services Bureau:

1. On June 29, 1993,[1] a petition on behalf of Independence Public Media of Philadelphia, Inc., licensee of Television Broadcast Station WYBE (Educ., Ch. 35), Philadelphia, Pennsylvania, was filed with the Commission claiming that TCI Cablevision of Maryland ("TCI") had declined to carry the station even though Philadelphia is within fifty miles of the system's headend at Elkton, Maryland, and it is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) [1992 Cable Act]. No opposition to this petition has been filed.

2. Station WYBE's petition establishes that it is entitled to carriage on the Elkton cable system, and it has requested carriage of its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed June 29, 1993, by Independence Public Media of Philadelphia, Inc. IS GRANTED, in accordance with §615(j) (3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and TCI Cablevision of Maryland IS ORDERED to commence carriage of Station WYBE forty-five days (45) from the release of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] Although WYBE's petition was originally filed on June 29, 1993, it was not perfected and accepted for filing until September 9, 1993.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Continental Broadcasting Corporation against Jones Intercable, Inc.	CSR-4130-M
Request for Carriage	

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1994; Released: June 7, 1994

By the Chief, Cable Services Bureau:

1. On October 7, 1993, a "Petition for Special Relief" was filed with the Commission on behalf of Continental Broadcasting Corporation, licensee of Low Power Television Station K59DB, Albuquerque, New Mexico claiming that Jones Intercable, Inc. had refused to carry K59DB's signal on its Albuquerque cable system after Continental had requested mandatory carriage under the Communications Act and the Commission's rules. In its petition, Continental seeks a special ruling from the Commission requiring Jones Intercable to carry K59DB's signal because of various public interest considerations related to its carriage. On November 18, 1993, an "Opposition to Petition for Special Relief" was filed on behalf of Jones Intercable, Inc. claiming that K59DB was not entitled to mandatory carriage on its Albuquerque cable system because it was not a "qualified" low power station under the Commission's rules and because Jones Intercable was dropping K59DB's from its lineup in order to make room for three other stations that were granted mandatory carriage. On December 15, 1993, a "Reply to Opposition" was filed on behalf of Continental Broadcasting Corporation challenging assertions made by Jones Intercable in its Opposition to Petition and reappealing to the various public interest objectives presented in its original petition.

2. Station K59DB is a low power television station licensed to serve Albuquerque, New Mexico. K59DB has been carried on Albuquerque's local cable system, operated by Jones Intercable, since 1989. It operates daily from 6:00 a.m. to 3:00 a.m., Monday through Friday, and from 8:00 a.m. to 1:00 a.m. on the weekend. K59DB is a full-time Spanish language station providing both network programming and local-based news and programming. K59DB has submitted documentation that suggests that K59DB receives significant viewing from Albuquerque's Hispanic and Spanish-speaking population. Other than Station KLUZ-TV, a full-power station, K59DB is the only local Spanish language television service on Intercable's system.

3. In its complaint, Continental essentially asserts that due to various overriding public interest considerations, the Commission should grant K59DB mandatory carriage on the Jones Intercable system in Albuquerque. Continental does not claim that K59DB is a "qualified" low power television station for mandatory carriage as defined under the Commission's rules. Instead Continental submits in its petition and in its supporting materials that because Continental and K59DB are minority-owned entities and because K59DB in turn offers an important localized service to a significant local minority population, the Commission should waive its rules and grant K59DB special relief. Continental cites 47 C.F.R. § 76.7 of the Commission's rules as specifically granting the Commission the authority to waive its own rules. Attached to its petition, Continental provides supporting evidence, including statistical data backing its conclusion that K59DB is an important local resource for Albuquerque's substantial hispanic population, personal statements from various public officials, public interest groups, business leaders and viewers of K59DB expressing their appreciation for K59DB's public service and their collective wish for K59DB's continued carriage on Jones Intercable, and a voluminous petition containing the signatures of a significant number of people who support K59DB's effort to ensure continued carriage on Albuquerque's local cable system.

4. Jones Intercable, Inc. opposes Continental's petition for mandatory carriage on its Albuquerque cable system. Jones Intercable asserts that K59DB is not a "qualified" low power television station for mandatory carriage under the Communications Act and the Commission's rules. Moreover, Jones Intercable claims that the Commission lacks the authority to grant special relief in this case because of the clear language regarding "qualified" low power television stations in the Communications Act and because of protections provided to it by the First Amendment. Finally, Jones Intercable questions the legitimacy of many of Continental's public interest arguments. Jones claims that it had to remove K59DB from its service to accommodate three qualified mandatory carriage stations, that it is already carrying two services directed at the Hispanic population and that K59DB is still available to viewers as an over-the-air channel. Jones has informed its subscribers that A/B input switches are available at its office so that K59DB's signal can be received by its cable subscribers without having to disconnect their cable wiring each time they wish to view K59DB.

5. Pursuant to §614(a) of the Communications Act, as amended, a cable system's signal carriage obligation includes carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a); 47 C.F.R. §76.56(b)(3). A LPTV station that conforms to the rules established for LPTV stations in part 74 of the Commission's rules will be considered "qualified" only if: (1) it broadcasts for at least the minimum number of hours of operation required for full power television stations under part 73 of the rules; (2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[1] (3) it complies with interference regulations consistent with its secondary status

[1] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commis-

pursuant to 47 C.F.R. Part 74; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas (MSAs) as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

6. Under certain limited circumstances enunciated in the Commission's rules, cable systems with more than 12 usable activated channels are required to carry low power television stations on their channel lineups.[2] Stations with 35 or fewer usable activated channels that have not filled the channels set aside for local commercial television stations must carry one "qualified" low power television station. 47 U.S.C. §534(c)(1)(A); 47 C.F.R. § 76.56(b)(3). Stations with more than 35 usable activated channels that have not filled the channels set aside for local commercial television stations must carry two "qualified" low power television stations. 47 U.S.C. § 534(c)(1)(B); 47 C.F.R. § 76.56(b)(3).

7. Station K59DB is not a "qualified" low power television station as defined by the Communications Act and the Commission's rules. *See* 47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d). Station K59DB is licensed to Albuquerque, New Mexico, which was one of the 160 largest Metropolitan Statistical Areas as of June 30, 1990 and which had a population over 35,000 on that date. *See* 47 U.S.C. § 534(h)(2)(E); 47 C.F.R. § 76.55(d)(5). Moreover, more than one full power television station is licensed to the Albuquerque area. *See* 47 U.S.C. § 534(h)(2)(F); 47 C.F.R. § 76.55(d)(6). Because a low power television station must meet each of the six criteria required by both the Communications Act and the Commission's rules, its failure to meet just one is fatal to its request for mandatory carriage.

8. Furthermore, the Commission does not have the authority to waive rules that have been statutorily promulgated by Congress. Without a grant of waiver authority, the Commission must enforce the letter of the law. In Continental's case this means that mandatory carriage cannot be granted to station K59DB under either the Commission's mandatory carriage rules nor under its power to grant special relief under § 76.7 of the Commission's rules.

9. We find that K59DB is not a qualified low power television station. Accordingly the complaint filed on October 7, 1993, by Continental Broadcasting Corporation, IS DENIED in accordance with § 614(h)(2) of the Communications Act, 47 U.S.C. § 534(h)(2). Jones Intercable, Inc. is not required to carry the signal of Station K59DB on its Albuquerque system. This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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sion [must] determine[] that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television stations because of geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. § 534 (h)(2)(B); 47 C.F.R. § 76.55(d).

[2] Section 76.56(b)(2) provides that "[a] cable system with more than 12 usable activated channels, as defined in Section 76.5(oo), shall carry local commercial television stations up to one-third of the aggregate number of usable activated channels of such system." 47 C.F.R. § 76.56(b)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Capital of Texas Public Telecommunications Council against TCI Cablevision of Texas, Inc. — CSR-4139-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1994; Released: June 7, 1994

By the Chief, Cable Services Bureau:

1. On October 21, 1993, a "Request for Carriage" was filed with the Commission on behalf of Capital of Texas Public Telecommunications Council ("Capital"), licensee of noncommercial educational television broadcast station KLRU-TV of Austin, Texas claiming that TCI Cablevision of Texas, Inc. ("TCI") had refused to carry KLRU's signal after Capital had elected mandatory carriage, as defined under the Communications Act, as amended, and the Commission's rules, on TCI's Seguin and New Braunfels cable systems. In its petition, Capital seeks a ruling from the Commission requiring TCI to carry KLRU's signal because it qualifies as a must-carry noncommercial educational ("NCE") station. No opposition to this petition has been filed.

2. In its petition, Capital states that KLRU is a qualified NCE station located within 50 miles of the Seguin and New Braunfels principal headends, as required for mandatory carriage by § 615(l)(2) of the Communications Act, as amended, and § 76.55(b) of the Commission's rules. On May 3, 1993, TCI notified Capital that KLRU's signal was not of sufficient technical quality to require its carriage on TCI's systems in Seguin and New Braunfels. Capital in two subsequent letters to TCI requested additional information regarding TCI's testing procedures and equipment used in determining its signal strength and indicated a willingness to bear the cost of improving KLRU's signal strength if necessary. On June 18, 1993, TCI provided Capital with a summary of its signal testing results, but also claimed that there was "substantial duplication" between the programming on KLRU and KLRN, a San Antonio-based NCE station carried on TCI's cable system, eliminating its obligation to carry KLRU's signal on the New Braunfels and Seguin systems. At this point, Capital and TCI disputed the impact of "substantial duplication" on the mandatory carriage rights of an NCE station. TCI maintains, by letter dated July 6, 1993, that a cable operator is not required to carry any NCE stations that are "duplicative," as defined by the Commission's rules. Capital counters that only after an operator has fulfilled its mandatory NCE carriage obligations, as determined by the Commission's rules, may it then refuse to carry additional NCE stations that are "duplicative."

3. It is undisputed that station KLRU is a qualified noncommercial educational station. Rather, the points of contention surrounding KLRU's request for carriage on TCI's Seguin and New Braunfels systems involve signal quality and programming duplication issues. Pursuant to Section 615 of the Communications Act, as amended, a cable system's signal carriage obligation includes carriage of NCE television stations. *See* 47 U.S.C. § 535; 47 C.F.R. § 76.56(a). Cable systems with 13 to 36 usable activated channels are required to carry up to, but not more than, three NCE stations. 47 U.S.C. § 535(b)(3); 47 C.F.R. § 76.56(a)(1)(ii). Cable systems with over 36 usable activated channels are required to carry a minimum of three NCE stations. 47 U.S.C. § 535(b)(3)(D); 47 C.F.R. § 76.56(a)(1)(iii). A cable operator is not required to carry a NCE station that does not deliver a signal of good quality to the cable operator's principal headend. 47 U.S.C. § 535(g)(4). Furthermore, a cable system with more than 36 usable activated channels is not required to carry an additional qualified NCE station on its channel lineup that "substantially duplicates" the programming broadcast by an NCE station already carried on the cable system if that system is carrying three NCE stations. 47 U.S.C. § 535(e); 47 C.F.R. § 76.56(a)(1)(iii).

4. Section 615(g)(4) of the Communications Act, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. § 535(g)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

5. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF non-commercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF non-commercial stations place adequate signal levels over a cable system's principal headend.

6. In this instance, if TCI chooses to challenge KLRU's mandatory carriage request based on inadequate signal quality, its evidence must conform to the following engineering standards and practices. Cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna

above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done.

7. In addition, our rules require that a cable operator must conduct multiple signal quality tests to ensure accurate results and, in turn, provide that testing information to the affected station when there is a dispute over signal level measurements. Generally, if the test results are less than -55 dBm for a VHF station, we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than four hours apart to establish reliable test results.[1] We find that TCI has not provided documentation to the Commission that indicates that it conducted multiple signal tests at its principal headend with the proper equipment on station KLRU's signal.[2] Until and unless TCI submits engineering data that both conforms to the testing guidelines set forth above and indicates that KLRU's signal is not of adequate strength and quality, it may not reject Capital's request for carriage of station KLRU on its Seguin and New Braunfels systems based on inadequate signal quality.

8. With respect to the second point of contention, we agree with Capital's assertion that the issue of programming duplication is irrelevant until more than three noncommercial educational stations are being carried on any given cable system with more than 36 usable activated channels. In order for programming duplication to be an issue with regard to NCE stations, a cable operator with more than 36 usable activated channels must already be carrying three NCE stations. Because TCI's systems in Seguin and New Braunfels appear to have more than 36 activated channels and to carry only one NCE station apiece (Station KLRN), KLRU has mandatory carriage rights on both systems regardless of its duplication status with station KLRN's programming. *See* 47 U.S.C. §535(e); 47 C.F.R. § 76.56(a)(iii).

9. Capital's petition establishes that NCE station KLRU is entitled to carriage on the Seguin and New Braunfels cable systems of TCI Cablevision.

10. Accordingly, the petition filed on October 21, 1993 by Capital of Texas Public Telecommunications Council IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535(j)(3)) of the Communications Act, as amended, and TCI Cablevision IS ORDERED to commence carriage of KLRU-TV forty-five (45) days from the release date of this Order unless TCI Cablevision submits within fifteen (15) days the engineering data required herein to support its assertion of poor signal quality from KLRU-TV at TCI Cablevision's principal headends in New Braunfels and Seguin. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[1] For UHF-TV stations, if the test results are less than -51 dBm we believe that at least four readings must be taken over a two hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements no more than four hours apart to establish reliable test results.

[2] TCI has not submitted any of its own evidence to the Commission on this matter. However, Capital, in its supporting documents to its petition, has included documents ("Attachment D") that contain the test results on KLRU's signal that TCI compiled and then sent to Capital on June 18, 1993. These documents indicate that TCI did not follow the procedures set forth in this decision and that no effort was made to confirm the accuracy of the results, which were derived from single tests conducted for both the Seguin and New Braunfels systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Osage Communications Incorporated	CSR-4081-M MOO283

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: June 7, 1994

By the Chief, Cable Services Bureau:

1. On September 21, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Osage Communications Incorporated ("Osage"), operator of a cable television system serving Buckner, Missouri, had declined to carry Station KMOS-TV, even though the Grade B contour of Station KMOS-TV encompasses the system's principal headend at Bucker,[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Station KMOS-TV requests that the Commission not only order Osage to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed. Station KMOS-TV's petition establishes that it is entitled to carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the Complaint filed September 21, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Osage Communications Incorporated IS ORDERED to commence carriage of Station KMOS-TV on cable channel 6, forty-five (45) days from the release of this *ORDER*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that Osage has not provided its headend coordinates to Station KMOS-TV as required by §76.58 of the Rules, despite Station KMOS-TV's letter of May 28, 1993, requesting carriage. Since no oppostion to Station KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Osage's headend is located at Buckner, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-114

In the Matter of

Review of the Commission's
Rules Governing the Low Power
Television Service

FIRST REPORT AND ORDER

Adopted: May 19, 1994; Released: June 2, 1994

By the Commission:

INTRODUCTION

1. On April 22, 1993, the Commission released its *Notice of Proposed Rule Making* in MM Docket No. 93-114, 8 FCC Rcd 2770 (1993). In the *Notice*, the Commission proposed to amend the rules and polices governing the low power television (LPTV) service, which includes LPTV stations and television translator stations. Specifically, we proposed to modify our current standard for acceptance of applications and to expand our waiver policy regarding terrain shielding. We also proposed to permit LPTV operators to use four-letter call signs rather than the current five-character call signs consisting of letters and numbers. These proposals raised little disagreement among commenters and are adopted in this *First Report and Order*. In addition, the *Notice* proposed to narrow the definition of what constitutes a major LPTV station modification. That issue generated significantly more diverse comment and requires further consideration. It will be resolved at a later date so as not to delay implementation of the changes we adopt herein.

2. The Commission established the LPTV service as a means of increasing diversity in television programming and station ownership. The Commission intended the service to provide opportunities for first local television outlets in smaller cities and towns, as well as to provide service to unserved audience-communities within the larger cities. After only twelve years since its creation, the LPTV service is more than meeting its expectations. Today 1400 LPTV stations serve diverse audiences in more than 750 communities and in all 50 states. These communities range in population from the hundreds to the millions. The hallmarks of the LPTV service are TV "localism" and specialized "niche" programming. Many LPTV stations air local news and public affairs programs and significant amounts of other locally produced programming. LPTV stations serve the needs and interests of many different ethnic communities, often airing programming in foreign languages. Specialized audiences of LPTV stations have included children, the elderly, students, tourists, farmers and boaters.

3. The LPTV service also has contributed to increased diversity in broadcast station ownership. LPTV station licensees include schools, colleges, churches, community groups, newspaper publishers and radio and TV broadcasters. The service has provided substantial first-time ownership opportunities for small businesses and members of minority groups. Small businesses also have benefitted from advertising over local LPTV stations because of the more affordable advertising rates and the ability to target advertising to specialized audiences.

APPLICATION ACCEPTANCE STANDARDS

4. In the *Notice*, the Commission noted that the volume of LPTV applications has decreased and the quality of those submissions has improved as a result of the strict standard requiring that an LPTV application be "complete and sufficient" (*i.e.*, "letter perfect") at the close of an LPTV filing window.[1] We pointed out that currently, applications that are not letter perfect are returned, forcing applicants to wait until the Commission opens a subsequent filing window to correct their submissions.[2] The *Notice* concluded that the strict standard has achieved its purpose of encouraging applicants to submit complete and carefully prepared applications, so as to alleviate the LPTV application backlog with which the Commission was faced. We therefore proposed that applications be judged on a "substantially complete" basis similar to that used in processing full-power television applications, whereby applications are considered acceptable if they are not patently defective. As an alternative to the substantially complete standard, the *Notice* suggested a mid-level acceptance standard requiring the application to be more than substantially complete but less than letter perfect.[3]

5. The commenters in this proceeding, who include LPTV licensees, consulting engineers, other broadcasters, law firms and educational institutions, overwhelmingly support adoption of a relaxed standard for acceptance of applications.[4] They agree with the *Notice* that the letter perfect standard is no longer necessary due to the decreased volume of LPTV applications. They also assert that the letter perfect requirement unfairly forces LPTV applicants filing defective applications to wait to refile in the next filing window, which sometimes does not open for a year. Further, commenters assert that a relaxed standard is more appropriate in light of the limited resources of most LPTV applicants.

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[1] Applications for LPTV construction permits and major changes to existing LPTV facilities are accepted during finite filing windows announced by the Commission.

[2] *See* 47 C.F.R. § 73.3564(a)(2).

[3] *Notice* at 2770-71.

[4] *See, e.g.*, CBS Comments at 2-4; Channel Eleven Comments at 1; CBA Comments at 3-4; du Treil, Lundin & Rackley Comments at 2-3; Findlay Comments at 3; NTA Comments at 2-3; San Bernardino Comments at 3-4; Smith and Powstenko Comments at 2-5; Byron W. St. Clair Comments at 2; Third Coast Comments at 1-2; University of California Comments at 1-2; Viking Comments at 1; W43AG Comments at 1; WFXV Comments at 2.

6. Of the commenters advocating relaxation of the current standard, only three favor the mid-level alternative. Cohen, Dippell and Everist submits that failure of an applicant to comply with the Commission's interference rules with respect to full-power TV stations should result in dismissal of the application without an opportunity for amendment.[5] du Treil, Lundin & Rackley would extend this treatment to applicants whose proposals fail to comply with the interference rules with respect to LPTV and TV translator stations and previously filed applications.[6] Hammett & Edison contends that the substantially complete approach would encourage sloppily prepared and essentially speculative applications.[7] In opposition, the Community Broadcasters Association (CBA) contends that resolution of challenges to the mid-level standard would likely be more time consuming than processing the few applications that would not pass a "mid-level" test, but would pass a "substantially complete" test. CBA further notes that because a substantially complete standard exists in other mass media contexts, case law exists to interpret it.[8] San Bernardino also opposes the mid-level approach, arguing that creating a list of incurable defects could lead to a waste of staff time and effort.[9]

7. Only one commenter opposes substantial relaxation of our LPTV application acceptance standards. May & Dunne submits that while a letter perfect standard is more costly to applicants than a relaxed standard, it makes it much more likely that applicants have the commitment and resources to build the station once the application is granted. It contends that our proposed change in processing standards would benefit few applicants and may lead to re-creation of the previous backlog.[10]

8. We will revise our LPTV application acceptance standards and adopt a "substantially complete" test. We agree with the overwhelming majority of commenters that the strict acceptance standard is no longer necessary in light of the reduced number of LPTV applications being filed with the Commission and in light of the improved quality of those applications. We are persuaded by the comments and by our processing experience to favor the substantially complete standard over a mid-level standard. We do not believe that the substantially complete standard will lead to a lessening of the overall quality of LPTV application submissions, nor significantly delay the authorization of LPTV service. Conversely, this standard will enable the authorization of more stations for each filing window. We believe that this modification of our application acceptance standards will greatly benefit LPTV applicants, many of whom have limited resources. We note that while we will give applicants an opportunity to cure defects in otherwise substantially complete applications, the corrected application must adhere to the Commission's rules and policies. For instance, if an amendment to an application eliminates predicted interference to one station but at the same time introduces interference to another station, the amended application will not be accepted and will be returned. Similarly, an application that is not substantially complete, that is not submitted with the proper fee, or that is not timely filed cannot be cured via subsequent amendment.

9. The Commission has developed a body of case law over the years governing broadcast applications that were subject to the substantially complete standard.[11] From these decisions, certain criteria were established, even though each case turned on the particular facts involved. In the cases where applications failed the test, it was found that many sections of the applications were deficient to a significant degree or were omitted entirely, so as to lack sufficient information regarding the adequacy of the proposals vis-a-vis the public interest.[12] Amendments were allowed to correct errors, unless the application, judged as a whole, was so patently violative of the rules as to make its processing a futile gesture.[13]

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[5] Cohen, Dippell and Everest Comments at 2-3.

[6] du Treil, Lundin & Rackley Comments at 2-3.

[7] Hammett & Edison Comments at 1. Hammett & Edison identifies a number of specific discrepancies that it would consider fatal defects.

[8] CBA Comments at 3-4.

[9] San Bernardino Comments at 3-4.

[10] May & Dunne Comments at 1-4; May & Dunne Reply at 3-5. May & Dunne suggests a minor relaxation of the present standard equivalent to the "hard look" standard formerly applied to FM applications. *See FM Applications*, 58 RR 2d 166 (1985). May & Dunne suggests that the Commission also give applicants a 30-day period from the date the application is noted as tendered for filing to file amendments as of right to correct any errors affecting the acceptability of the application.

[11] *See generally, Miami STV, Inc.*, 42 RR 2d 1056 (Broadcast Bureau 1978); *KALE, Inc.*, 56 FCC 2d 1033 (1975); *Trustees of Dartmouth College*, 29 RR 2d 59 (1973); *Central Florida Enterprises, Inc.*, 22 FCC 2d 260 (1970). Prior to the adoption of the stricter LPTV and FM standards, all broadcast applications were processed under the substantially complete standard.

[12] *See National Business Network*, 82 FCC 2d 220 (1978). For instance, in *Henry M. Lesher*, 67 FCC 2d 278 (1977), an FM application lacked substantial portions of the legal and financial sections and almost all of the community ascertainment information. Characterizing the omissions as "glaring" and "numerous," the Commission stated that they impaired its ability to evaluate the applicant's qualifications under the public interest standard, and that conclusion was compelled by the cumulative impact of each uncompleted section. In *Voice of Information*, 27 FCC 2d 723 (1971), an FM application was judged on the basis of "degree of completeness" and rejected because it omitted the entire engineering and EEO sections and significant portions of the legal, financial and ascertainment sections. The Commission concluded that it lacked "sufficient information to reach many of the necessary determinations regarding the adequacy of the proposal . . ." *Id.* at 725. In *George E. Oleson*, 5 FCC 2d 58 (1966), *recon. denied*, 6 FCC 2d 5021 (1967), an AM application was "incomplete in many respects" because it lacked significant portions of the financial, ascertainment, program service, and engineering sections. In *Rancocas Valley Broadcasting Co., Inc.*, 95 FCC 2d 429 (1983), an AM application lacked a proper signature, six of ten answers concerning parties to the proposal, and a financial certification. The Commission characterized the missing data as essential to a threshold showing, given their quantity and significance.

[13] *K & L Communications, Inc.*, 70 FCC 2d 1987, 1989 (1979) (TV application found acceptable despite financial and minor EEO omissions); *see also National Business Network, supra*, note 12 (TV application acceptable despite defects in some financial information, ascertainment and description of STV proposal); *Racine Telecasting Co.*, 51 RR 2d 1205 (1985) (TV application acceptable despite seven omissions in the engineering section); *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976) (signature defect can be rectified); *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981) (TV application acceptable despite incomplete source of funds and contemplation of additional unknown limited partners); *Galaxy Broadcasting, Inc.*, 46 RR 2d 1654 (Broadcast Bureau 1980) (TV application acceptable despite omissions in STV proposal and ascertainment surveys); *Focus Broadcasting*

10. Following these precedents, the staff will consider applications as not substantially complete, and therefore subject to dismissal as patently defective, if they omit all of or large portions of several sections of the application. This test reflects the criteria applied by the Commission in prior cases decided under this standard, while recognizing the differences in the current LPTV application form (FCC Form 346). Additionally, in accordance with longstanding Commission policy, an application found to have been filed without reasonable assurance of site availability will not be considered substantially compete and will be dismissed as patently defective.[14] Keeping in mind that each case will be different, our general purpose in adopting this standard, as urged by CBA, is to eliminate the present "booby traps that await even the most *bona fide* applicant under the letter perfect standard."[15] It has been the experience of the staff that very few LPTV applications are submitted to the Commission in a condition not meeting this substantial completeness test. The simplified format of the LPTV application form, which generally specifies the exact information to be submitted in boxes rather than in narrative exhibits, serves to guide applicants in successfully completing the form.

11. Accordingly, in keeping with the proposals advanced in the *Notice*, applicants filing substantially complete applications containing defects or omissions will be given an opportunity to cure the defects. If the defect prevents the staff from further processing the application, a deficiency letter will be issued and the applicant will have 30 days from the date of that letter to correct the defect. If the defect does not prevent processing, the staff will not send a deficiency letter until it completes pre-acceptance studies on the application or until a subsequent defect prevents further processing, at which time the applicant will be given 30 days to amend. Applicants will be given one opportunity to amend for each deficiency letter received. Applications revised to correct all defects identified by the staff and that do not introduce any new defects will then be listed as "Accepted for Filing" in a public notice, either in the form of a lottery announcement notice for mutually-exclusive applications or a "proposed grant list" for non-mutually-exclusive applications. Any amendment submitted to correct a defective application must be a minor amendment[16] and must otherwise be acceptable in all respects. The same policies and procedures that apply before the application is accepted for filing will govern correction of deficiencies identified in the post-acceptance stage. In order to prevent undue processing delays, we will enforce strictly the 30-day period.[17]

Terrain Shielding

12. The Commission's present terrain shielding policy in the LPTV service provides that the Commission will waive its application acceptance standards for predicted interference when it is demonstrated that, due to the existence of intervening terrain, an applicant's proposed operation will not cause interference to another facility.[18] Consideration of waivers based on terrain shielding is currently limited to LPTV applications that are not mutually-exclusive with other applications submitted during a particular filing window. We proposed in the *Notice* to broaden the circumstances in which terrain shielding waivers can be used in the authorization of LPTV service. Because the volume of applications is now manageable, we stated that it was administratively feasible to expand the terrain waiver policy to include mutually-exclusive applications. In this regard, we proposed to consider an applicant's terrain shielding showing with respect to a protected broadcast facility, even if that application is mutually-exclusive with another timely filed LPTV application(s), allowing the application to be accepted for filing.

13. Further, the *Notice* proposed to permit applicants to consider terrain shielding as a basis for resolving situations of mutual exclusivity. Without consideration of terrain, proposed facilities in mutually-exclusive applications, by definition, are predicted to interfere with each other to the extent that not all of them can be granted. Under our proposal, applicants for nearby LPTV facilities using the same channel but separated by terrain obstructions could all be granted, without involvement in the Commission's random selection (*i.e.*, lottery) process. Finally, the *Notice* proposed to take terrain shielding into account when applicants raise it for the first time in amendments responding to deficiency letters.[19]

14. No commenter opposes our proposals to expand our waiver policy regarding terrain shielding to mutually-exclusive applicants and to permit applicants to consider terrain shielding as a basis for resolving situations of mutual exclusivity. Commenters support these proposals as a practical approach to acceptance of applications that more realistically reflects a station's actual potential to interfere with another station.[20] A few commenters object to our proposal to take terrain shielding into account when applicants raise it for the first time in amendments responding to deficiency letters. du Treil, Lundin & Rackley and the University of California submit that any terrain shielding request should be included with the initial application.[21] The University of California contends that this will minimize the number of mutually exclusive LPTV applications. While May & Dunne would permit an applicant to submit a terrain shielding showing during a 30-day amendment period, it opposes the acceptance of terrain shielding showings submitted in response to a Commission action

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of the Monterey Peninsula, Inc., 49 RR 2d 1451 (Broadcast Bureau 1981) (TV application acceptable despite failure to document availability of funds); *LDA Communications, Inc.*, 49 RR 2d 1290 (Broadcast Bureau 1981) (TV application acceptable despite omission of loan and equipment credit documentation).

[14] *See 62 Broadcasting, Inc.*, 4 FCC Rcd 1768 (1989); *see also South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 842 (Rev. Bd. 1984) ("It is elemental that a prospective construction permittee must have, if little else, an antenna site, a technical keystone of the broadcasting operation").

[15] CBA Reply at 3.

[16] *See* 47 C.F.R. § 73.3572(a).

[17] Extensions of time may be granted if the applicant is able to show good cause why it cannot file its amendment within the 30-day period.

[18] *Commission Policy Regarding Terrain Shielding*, 3 FCC Rcd 2664 (1988), *recon. granted in part*, 3 FCC Rcd 7105 (*Terrain Shielding Policy Statement*). See 47 C.F.R. §§ 74.705, 74.707 and 74.709 for LPTV application acceptance standards for interference protection.

[19] *Notice* at 2772.

[20] *See, e.g.*, CBA Comments at 4; NTA Comments at 3-4.

[21] du Treil, Lundin & Rackley Comments at 3; University of California Comments at 2.

dismissing the application or otherwise raising issues concerning the technical representations in the application.[22] Some commenters also propose changes to our existing terrain shielding procedures.[23]

15. We will adopt the proposals advanced in the *Notice* regarding terrain shielding waivers. We believe that if intervening terrain prevents an LPTV applicant from interfering with other LPTV or full-power TV stations or other LPTV facilities proposed in pending applications, the applicant should be permitted to take that situation into account, regardless of whether the application is mutually exclusive with another LPTV application. The proposals we adopt in this proceeding do not affect the nature of applicants' terrain shielding waiver submissions, nor the manner in which the staff evaluates such submissions, as provided in the Commission's LPTV *Terrain Shielding Policy Statement*. LPTV applicants seeking terrain shielding waivers should continue to follow the existing criteria for demonstrating noninterference based on terrain considerations, *i.e.*, submitting either detailed profiles of the terrain in pertinent directions toward the protected signal contours of potentially affected stations or letters of assent from the licensees of such stations, agreeing that terrain shielding would prevent interference but without surrendering the right to be protected against any actual interference. Also, mutually-exclusive applicants may now use either of these methods to demonstrate that their respective station proposals could co-exist without an interference conflict.[24] Further, while we strongly urge applicants to fully address applicable terrain shielding conditions at the initial application stage, we will accept a satisfactory terrain shielding showing for the first time in response to a deficiency letter. We believe that this will facilitate the initiation of new or modified LPTV station operations by treating the omission of terrain shielding data like any other error in an otherwise substantially complete application and giving the applicant an opportunity to make appropriate corrections.

16. In adopting the LPTV terrain shielding proposals in the *Notice*, we are simply removing administrative barriers that were necessary when the LPTV *Terrain Shielding Policy Statement* was first established. Had the current LPTV application processing climate existed at that time, we would not have found it necessary to limit consideration of terrain shielding among LPTV applicants. In the more than five years since its adoption, our terrain policy has enabled the grant of more than 200 LPTV and TV translator stations that otherwise would not have been possible. The policy also has been successful in terms of interference protection. LPTV stations are not permitted to interfere with the regularly viewed signals and programs of full-power TV stations. We know of no instance in which the grant of a terrain shielding waiver in the LPTV service has resulted in interference to the reception of another broadcast facility. Thus, our broadening of eligible LPTV applicants for terrain shielding waivers should not increase the likelihood that LPTV stations will cause interference to the reception of full-power TV stations.

Call Signs

17. In the *Notice*, we proposed to amend our rules to permit LPTV stations to request four-letter call signs rather than the five-character alpha-numeric call signs that are currently assigned. We stated our belief that such a modification may be competitively beneficial to the LPTV industry and may reduce confusion to viewers, who are accustomed to four-letter call signs. We proposed to append a distinctive suffix such as "LP" to any LPTV four-letter call sign to avoid confusion with full-power television stations.[25]

18. The *Notice* presented two options for assigning four-letter call signs. Under the first option, as proposed by CBA, four-letter call signs would be permitted only for LPTV stations that meet certain threshold requirements, including a minimum number of hours of operation and a given amount of locally originated programming, as well as other requirements currently imposed on full-power stations such as the multiple ownership, children's programming, main studio and public file requirements. Alternatively, the second option would permit all LPTV stations to request four-letter call signs upon applying for a license. We stated our inclination to favor the second option.[26]

19. No commenter opposes permitting LPTV stations to use four-letter call signs, and all parties specifying a pref-

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[22] May & Dunne Comments at 7-10, 9 n.4.

[23] du Treil, Lundin & Rackley contends that if the National Bureau of Standards Technical Note 101 is used, the methods should be fully described in the application. du Treil, Lundin & Rackley Comments at 3. Technical Note 101 is a publication of the National Bureau of Standards detailing an assortment of signal propagation methods and models suitable for use in differing terrain and other conditions. Hammett & Edison urges the Commission to give official notice to the Terrain Integrated Rough Earth Model (TIREM), arguing that it is superior to Technical Note 101. Hammett & Edison Comments at 11-12. Cohen, Dippell and Everist contends that the Commission should require a detailed terrain analysis with regard to interference situations concerning full-power TV stations, as opposed to the current policy of a limited terrain shielding study and a consent letter. It asserts that this would avoid any potential conflict in the future due to a change in the full-power station's ownership. Cohen, Dippell & Everist Comments at 3. Smith and Powstenko suggests that the Commission adopt a more exacting definition of the minimum showing required of applicants requesting terrain waivers. Smith and Powstenko Comments at 6-7. Also, MSTV/NAB would apparently limit the use of terrain shielding only between mutually-exclusive LPTV applicants. MSTV/NAB Comments at 2 n.3. In *Commission Policy Regarding Terrain Shielding*, 3 FCC Rcd 7105 (1988), we concluded that case-by-case evaluation of terrain shielding "affords the administrative flexibility to select from among available prediction models one that applies to the topographic features in each case." The existing flexible guidelines have worked well in practice and we see no need to revise them. Moreover, we believe that modifications to our current policy would be at odds with our aim in this proceeding, which is to streamline the LPTV application process. We decline, therefore, to pursue further in this proceeding these suggested modifications to our current LPTV terrain shielding policy.

[24] We reiterate that where two mutually-exclusive applicants choose to resolve the exclusivity by agreeing that interference between their two facilities would not be likely due to the existence of intervening terrain, the parties will be responsible for eliminating any interference that might occur, and the parties are expected to cooperate fully to that end. *See Notice* at 2772.

[25] *Notice* at 2774.

[26] *Id.*

erence prefer the second option.[27] Commenters contend that four-letter call signs will facilitate marketing and will be easier to include in ratings books and ratings surveys. They also argue that four-letter call signs will alleviate public confusion regarding the nature of LPTV stations; they submit that the current call signs can lead the public to mistake LPTV stations for amateur radio operations. In addition, W43AG and May & Dunne suggest that stations be required to originate programming before they can request a four-letter call sign.[28] This requirement would prevent TV translator operators from making such a request. The National Translator Association (NTA) submits that call signs are not a significant issue for TV translator operators, and notes that TV translator operators would prefer to have no identification requirement.[29]

20. Most commenters, primarily LPTV operators, oppose the adoption of an "LP" suffix as unnecessarily segregating LPTV stations from full-power television stations.[30] They analogize that licensees in different broadcast services use four-letter call signs without any suffix requirement. For example, they note, a Class A FM station is not designated any differently from a Class C FM station, nor do AM daytimers have to distinguish themselves from full-time AM stations. Some of these commenters suggest that if the Commission does require a suffix, the suffix should be "CT" (for "community television"), "TX" (as used in the FCC TV engineering database), or "TV."[31] Hammett & Edison and MSTV/NAB support use of an "LP" suffix.[32]

21. Another area in which some commenters differ with the *Notice* deals with when an LPTV station should be eligible to request a four-letter call sign. The *Notice* proposed to award four-letter call signs at the time the LPTV license is applied for rather than at the construction permit stage. CBA and Byron W. St. Clair believe that an LPTV operator should be permitted to request a four-letter call sign as soon as the construction permit is issued.[33] NTA similarly supports awarding a four-letter call sign before a station becomes operational.[34] These commenters contend that early assignment of a four-letter call sign will allow the LPTV station to more effectively market itself to the public.

22. All initial construction permits for LPTV stations will continue to be issued with a five-character alphanumeric call sign. However, we will permit any LPTV station that so chooses to request a four-letter call sign, without threshold operating requirements, after receiving its construction permit.[35] We stated our belief in the *Notice* that only licensed LPTV stations should be able to apply for four-letter call signs because many LPTV construction permits never become operational.[36] We recognize commenters' concerns, however, that LPTV operators need to have four-letter call signs as early as possible to effectively market their stations to the public. CBA suggests that an LPTV station be permitted to apply for a four-letter call sign at any time after issuance of the initial construction permit if the request is accompanied by a certification that a firm equipment order has been placed or that physical construction is underway at the transmitter site.[37] We believe that this limited restriction is not unreasonable in that it will not unduly burden LPTV permittees and will promote efficient use of Commission resources. Accordingly, a permittee requesting a four-letter call sign must include with that request a certification that it has placed a firm equipment order, which includes a down payment for such major components as a transmitter or a transmitting antenna, that physical construction is underway at the transmitter site or that the station has been constructed. In addition, permittees, as well as LPTV licensees requesting a four-letter call sign, must also submit the drug certification statement required by Section 1.2002 of the Commission's Rules. By a later public notice, a schedule will be established by which licensees and permittees will be able to apply for four-letter call signs. Those stations in operation for the longest period of time will have the opportunity to apply first.[38]

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[27] *See, e.g.*, Channel Eleven Comments at 1; CBA Comments at 7-8, 8 n.10 (although CBA in its petition for rulemaking had proposed the first option, its comments on the *Notice* indicate "that it would be amenable to the second option); Findlay Comments at 2-3; Hammett and Edison Comments at 12; May & Dunne Comments at 5-7; MSTV/NAB Comments at 8-10; MW TV Comments at 1-2; NTA Comments at 5-6; NSU Comments at 1; San Bernardino Comments at 10; Reporter-Times Comments at 1; Byron W. St. Clair Comments at 4-5; Third Coast Comments at 4-5; University of California Comments at 1; Venture Comments at 1-2; VideoIndiana Comments at 2-3; Viking Comments at 1; W43AG Comments at 3-5; WFXV Comments at 3.

[28] W43AG Comments at 4-5; May & Dunne Comments at 6-7.

[29] NTA Comments at 5-6.

[30] *See, e.g.*, CBA Comments at 9; CBA Reply at 2-3; Findlay Comments at 2-3; NSU Comments at 1; Byron W. St Clair Comments at 4-5; Third Coast Comments at 4; May & Dunne Reply at 1-3; University of California Comments at 1; Venture Comments at 1-2; W43AG Comments at 3-5; WFXV Comments at 3.

[31] *See, e.g.*, Findlay Comments at 2-3 ("CT"); Third Coast Comments at 4 ("TX"); University of California Comments at 1 ("TV"); W43AG Comments at 5 ("TV"). In addition, May & Dunne, Third Coast and WFXV suggest that the name of the LPTV service be changed to "Community Television." May & Dunne Reply at 1-3; Third Coast Comments at 4; WFXV Comments at 3. As we stated in the *Notice*, the proposal to rename the LPTV service, which was originally advanced by CBA, does not warrant further consideration at this time. *See Notice* at 2770 n.1.

[32] Hammett & Edison Comments at 12; MSTV/NAB Comments at 8-9.

[33] CBA Comments at 8-9; Byron W. St. Clair Comments at 4-5.

[34] NTA Comments at 5-6.

[35] All initial LPTV construction permits will be issued with a five-character LPTV call sign. TV translator stations appear to have no need for four-letter call signs and therefore will not be eligible to request them.

[36] *Notice* at 2774 n.24.

[37] *See* CBA Comments at 8-9. We note that while CBA proposes this alternative, it would prefer unrestricted assignment of four-letter call signs to permittees requesting them.

[38] There are now 1,400 licensed LPTV stations and an additional 1,300 outstanding LPTV construction permits, which represent a potentially large number of requests for modified call signs. Accordingly, we believe that a phased implementation of the new LPTV call sign policy is necessary to ensure expeditious handling of call sign requests and the avoidance of delays. A fair and flexible means of accomplishing this is first to accept requests from operators of licensed stations on the basis of years of operation. Once all station licensees have been afforded an opportunity to request a four-letter call sign, the opportunity will be extended to LPTV permittees. The certification require-

23. All LPTV four-letter call signs will include a suffix of "-LP," (*e.g.*, "WXYZ-LP"). We do not agree that the suffix will unduly prejudice LPTV stations, and we believe that such a suffix is necessary to distinguish LPTV stations from full-power television stations so as to guard against public confusion. The commenters' comparison of the relationship between LPTV and full-power stations to that of different types of stations in other broadcast services is inapposite. Different classes of FM stations are all regulated as part of the FM service, and different classes of AM stations are all regulated under the AM service. LPTV stations, however, are regulated as a distinct broadcast service from full-power television stations. As such, they are not constrained to follow rules applicable to full-power stations such as multiple ownership restrictions, children's programming rules, the prime time access rule, local public file requirements and main studio requirements. Moreover, they operate on a secondary, non-interference basis. We believe that the distinctive suffix "-LP" is more appropriate than "TV," "CT" or other suggestions because it best reflects the longstanding denomination of the service and would not introduce new and possibly confusing terminology.

24. As we proposed in the *Notice*, requests for four-letter call signs will be handled under the practices detailed in Section 73.3550 of the Commission's Rules.[39] An LPTV operator may not request a call sign used by another broadcast station unless the stations are commonly owned, or unless the LPTV operator has the other station's written consent. Also in keeping with the *Notice*, where a call sign is requested by more than one party, the first operator to file its request with the Commission will prevail. In the case of identical requests filed on the same day, the call letters will be assigned to the station with the longest continuous record of broadcasting operation under substantially unchanged ownership and control.[40] We also adopt the proposal of MSTV/NAB that a full-power television station will prevail in the situation where a full-power station and an LPTV station apply for the same call sign on the same day.[41] Similarly, an AM or FM radio station will prevail over an LPTV station applying for the same call sign on the same day.

ADMINISTRATIVE MATTERS

Final Regulatory Flexibility Analysis

25. Pursuant to the Regulatory Flexibility Act of 1980, the Commission has prepared a Final Regulatory Flexibility Analysis for this item as follows.

I. Need for and Purpose of this Action:

26. This action is taken to relax the Commission's standards regarding acceptance of applications for stations in the low power television (LPTV) service, and to permit LPTV stations to request four-letter call signs.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis: None.

III. Significant Alternatives Considered and Rejected:

27. The Commission considered a lesser relaxation of the application acceptance standards. The Commission also considered not allowing LPTV operators to apply for four-letter call signs until after they are licensed.

28. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 4 U.S.C. § 601, *et seq.* (1981)).

ORDERING CLAUSE

29. IT IS THEREFORE ORDERED that pursuant to the authority contained in Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), the Commission's policy changes set forth herein ARE ADOPTED, and Sections 73.3522, 73.3550, 73.3564, 73.3591, 74.780 and 74.783 of the Commission's Rules, 47 C.F.R. §§ 73.3522, 73.3550, 73.3564, 73.3591, 74.780 and 74.783, ARE AMENDED as set forth in Appendix B below. The revisions to Section 73.3564 and 73.3591 relieve existing restrictions. As such, they are exempt from the effective date requirements of the Administrative Procedure Act, 5 U.S.C. § 553(d)(1), and will become effective upon publication in the Federal Register. The revisions to Section 73.3522 will become effective 60 days after publication in the Federal Register. The revisions to Sections 73.3550, 74.780, 74.783 and to the Commission's terrain shielding

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ment will effectively enable the Commission to award four-letter call signs to those permittees most likely to construct and operate their stations.

[39] Requests for modified call sign assignments can be made by letter to the Commission in accord with Section 73.3550.

[40] *See Notice* at 2774.

[41] *See* MSTV/NAB Comments at 9-10. In addition, the University of California submits that an LPTV licensee should be permitted to use the same call sign for all of its LPTV stations. University of California Comments at 1. We decline to adopt this suggestion, as we believe it would cause undue confusion to the public, Commission staff and other interested parties.

Several parties raise other issues not addressed in the *Notice*. du Treil, Lundin & Rackley proposes that applicants be permitted to request a change in the offset of another existing authorized or proposed LPTV or translator station. du Treil, Lundin & Rackley Comments at 4. Hammett & Edison makes a number of suggestions regarding antenna azimuths, upgrading of existing LPTV or TV translator stations not operating on specified offsets, type acceptance, the definition of how to calculate the depression angle to the radio horizon, and distance and bearing calculations. Hammett & Edison Comments at 3, 7-11. San Bernardino requests that filing windows be set on a regular basis and that the Commission reiterate that LPTV service is secondary, and states its support for the Commission's determination not to increase LPTV and translator power limits. San Bernardino Comments at 11-13. The suggestions of Venture and Viking regarding mandatory cable carriage and retransmission consent are similarly not within the scope of this proceeding and will thus not be considered here. *See* Venture Comments at 2-4; Viking Comments at 1-2.

policy in the LPTV service will become effective 60 days after they are published in the Federal Register and subject to approval by the Office of Management and Budget.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

List of Commenters

Initial Comments

1. Association for Maximum Service Television, Inc. and the National Association of Broadcasters (jointly) (MSTV/NAB)
2. CBS, Inc.
3. Channel Eleven, Inc.
4. Cohen, Dippell and Everist, P.C.
5. Community Broadcasters Association (CBA)
6. du Treil, Lundin & Rackley, Inc.
7. Findlay Television Corporation
8. Hammett & Edison, Inc.
9. May & Dunne, Chartered
10. MW TV, Inc.
11. National Translator Association
12. Northeastern State University
13. Office of Special Districts, San Bernardino County, CA (San Bernardino)
14. Reporter-Times, Inc.
15. Smith and Powstenko
16. B.W. St. Clair
17. Third Coast Broadcasting, Inc.
18. University of California
19. Venture Technologies Group, Inc.
20. VideoIndiana, Inc.
21. Viking Communications, Inc.
22. W43AG, Hopkinsville, KY
23. WFXV-TV, Inc.

Reply Comments

1. Community Broadcasters Association
2. May & Dunne, Chartered

Other Correspondence

1. Sherwin Grossman

APPENDIX B

Rule Changes

Parts 73 and 74 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334.

2. Section 73.3522 is amended by revising paragraph (a)(3) to read as follows:

§ 73.3522 Amendment of applications.

(a) * * *

(3) Subject to the provisions of §§ 73.3525, 73.3572 and 73.3580, any application for a low power TV, TV translator or TV booster station may be amended as a matter of right during the application window filing period pursuant to § 73.3564(d). If it is determined that a low power TV, TV translator or TV booster application is substantially complete but contains some defect(s) or omission(s), a deficiency letter will be issued affording the applicant 30 days to correct the defect.

* * * * *

3. Section 73.3550 is amended by revising paragraphs (b), (f), (h), (j) and (n), as follows:

§ 73.3550 Requests for new or modified call sign assignments.

* * * * *

(b) No request for a new call sign assignment will be accepted from an applicant for a new station until the FCC has granted a construction permit. Failure by the permittee of a new station to request the assignment of a specific call sign within 30 days of grant of the construction permit will result in the FCC, on its own motion, assigning an appropriate call sign. All initial construction permits for low power TV stations will be issued with a five-character low power TV call sign.

* * * * *

(f) Only four-letter call signs (plus an LP suffix or FM or TV suffixes, if used) will be assigned. However, subject to the other provisions of this section, a call sign of a station may be conformed to a commonly owned station holding a three-letter call sign assignment (plus FM, TV or LP suffixes, if used).

* * * * *

(h) Call signs are assigned on a "first-come-first-served" basis. Receipt by the FCC of a request for an available call sign blocks the acceptance of competing requests until the first received request is processed to completion. In the case of requests for the same call sign being received on the same date at the FCC, the assignment (if otherwise grantable) will be made to the station having the longest continuous record of broadcasting operation under substantially unchanged ownership and control. However, involuntary and *pro forma* assignments will not be taken into account in determining priority. If a low-power TV operator and an AM, FM or full-power TV operator apply for the same call sign on the same date at the FCC, the AM, FM or full-power TV operator will prevail.

NOTE: The provisions of paragraph (h) of this section shall not apply to a licensee requesting a transfer to another frequency where the existing and new facilities serve substantially the same area (*i.e.*, where at least one of the stations serves both communities of license).

* * * * *

(j) The provisions of this section shall not apply to International broadcast stations, to stations authorized under Part 74 of the rules (except as provided in § 74.783 of this chapter), nor to FM or TV stations seeking to modify an existing call sign only to the extent of adding or deleting an "-FM" or "-TV" suffix. The latter additions and deletions may be effective upon notification to the Commission.

* * * * *

(n) Where a requested call sign, without the "-FM," "-TV" or "-LP" suffix, would conform to the call sign of any other non-commonly owned station(s) operating in a different service, the applicant must obtain and submit with the application for the call sign the written consent of the licensee(s) of such stations.

4. Section 73.3564 is amended by revising the second sentence of introductory paragraph (a) and paragraph (a)(2) to read as follows:

§ 73.3564 Acceptance of applications.

(a) * * * "Except for non-reserved band FM (except for Class D) applications, those found to be complete or substantially complete are accepted for filing and are given file numbers..." * * *

* * * * *

(2) The application must not omit more than 3 of the second tier items specified in appendix C, Report and Order, MM Docket No. 91-347, FCC 92-328, 7 FCC Rcd 5074 (1992); 57 Fed. Reg. 34,872 (August 7, 1992). Applications found not to meet minimum filing requirements will be returned to the applicant. Applications found to meet minimum filing requirements but that contain deficiencies in tender and/or acceptance information shall be given an opportunity for corrective amendment pursuant to § 73.3522. Applications found to be substantially complete and in accordance with the Commission's core legal and technical requirements will be accepted for filing. Applications with uncorrected tender and/or acceptance defects remaining after the opportunity for corrective amendment will be dismissed with no further opportunity for corrective amendment. In the case of low power TV, TV translator and TV booster applications, those found to be substantially complete will be listed on a Commission public notice as tendered for filing and given file numbers. Those that are not substantially complete will be returned to the applicant. If it is determined that a low power TV, TV translator or TV booster application is substantially complete but contains some defect(s) or omission(s), a deficiency letter will be issued affording the applicant 30 days to correct the defect. If the defect is not corrected within 30 days of the date on the deficiency letter, the application will be returned with no further opportunity to amend.

* * * * *

5. Section 73.3591 is amended by revising paragraph (b) to read as follows:

§ 73.3591 Grants without hearing.

* * * * *

(b) In making its determinations pursuant to the provisions of paragraph (a) of this section, the FCC will not consider any other application, or any application if amended so as to require a new file number, as being mutually exclusive or in conflict with the application under consideration unless such other application was substantially complete, and tendered for filing by:

* * * * *

Part 74 - Experimental, auxiliary, and special broadcast and other program distributional services

6. The authority citation for Part 74 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

7. Section 74.780 is amended by adding the reference "Section 73.3550 -- Requests for new or modified call sign assignments" after the reference to Section 73.3545 and before the reference to Section 73.3561.

8. Section 74.783 is amended by redesignating paragraph (e) as paragraph (f) and adding new paragraph (e) to read as follows:

§ 74.783 Station identification.

* * * * *

(e) Low power TV permittees or licensees may request that they be assigned four-letter call signs in lieu of the five-character alpha-numeric call signs described in paragraph (d) of this section. Parties requesting four-letter call signs are to follow the procedures delineated in § 73.3550. Such four-letter call signs shall begin with K or W; stations west of the Mississippi River will be assigned an initial letter K and stations east of the Mississippi River will be assigned an initial letter W. The four-letter call sign will be followed by the suffix "-LP." A party holding a low power TV construction permit who requests a four-letter call sign must file with that request a certification that the station has been constructed, that physical construction is underway at the transmitter site or that a firm equipment order has been placed.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6482
Tariff F.C.C. No. 12
Option 126

ORDER

Adopted: May 25, 1994; Released: May 25, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 14, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing revises the option design to include six 45 Mbps Data Transmission Capability Network Component Service Elements, increases the Basic and Minimum Annual Charges, and revises the minimum Service Element requirement to cover the new Service Elements in the tariff. The transmittal is currently scheduled to take effect on June 6, 1994.[1]

2. On February 22, 1994, Tel-Save, Inc. (Tel-Save) filed a petition to reject or suspend and investigate Transmittal No. 6482. AT&T filed a reply on February 25.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6482, Tel-Save's petition, and AT&T's reply. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 6482, filed by Tel-Save, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Deputy Chief, Tariff Division
Common Carrier Bureau

[1] Special Permission No. 94-622 has been granted to advance the effective date of Transmittal 6482 to May 26, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 634

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 27, 1994; Released: May 31, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On June 9, 1993, the Commission released the *BNA Order*,[1] requiring local exchange carriers (LECs) to file tariffs for the provision of billing name and address information (BNA) to telecommunications service providers. The Commission specified that LECs were required to file tariffs for the provision of BNA information of customers with listed telephone numbers on or before September 8, 1993,[2] and in later Orders, specified that tariffs for the provision of BNA associated with unlisted or nonpublished telephone numbers were to be filed on February 23, 1994.[3] The LECs' tariffs for the provision of "listed" BNA have already taken effect.[4]

2. On February 18, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a tariff for "unlisted" BNA. American Telephone and Telegraph Company (AT&T) and MCI Telecommunications Corporation (MCI) filed petitions to reject or suspend and investigate the Bell Atlantic tariff on March 7, 1994.[5]

3. MCI claims that Bell Atlantic seeks exogenous treatment of the costs of providing notification to unlisted customers.[6] MCI observes that BNA costs are not included in the list of exogenous cost categories specified in Section 61.45(d) of the Commission's Rules, 47 C.F.R. § 61.45(d). MCI also maintains that, in the absence of a rule change or an explicit Commission decision permitting or requiring exogenous treatment of a particular cost, LECs seeking such treatment must file a petition for rulemaking or waiver.[7]

4. AT&T claims that Bell Atlantic's BNA tariff violates the BNA rules by prohibiting BNA disclosure for 1+ calls and 10XXX 1+ calls where those end users have requested that their BNA not be disclosed. AT&T also asserts that this tariff would prohibit disclosure of unlisted BNA for these calls even if those customers have subscribed to an AT&T calling plan.[8] Bell Atlantic responds that tariff provisions restricting disclosure of BNA of customers who have requested that their BNA not be disclosed is required by the Commission's Rules.[9] Bell Atlantic asserts that more than 8000 of its subscribers have demanded that their BNA not be released, and that these subscribers would probably be opposed to BNA disclosure for 10XXX calls.[10]

5. AT&T also contends that, without disclosure of BNA for 1+ and 10XXX calls, it is exposed to a risk of fraud or uncollectible charges. AT&T claims there is no way to check for the availability of BNA for 1+ and 10XXX calls analogous to the Line Information Database (LIDB) for calling card, collect and third party calls.[11] AT&T also criticizes Bell Atlantic's tariff for not stating whether it will block the 1+ and 10XXX calls of customers for which BNA is not available.[12] AT&T further notes that unlisted BNA tariffs filed by other carriers are limited to calling card, third party and collect calls.[13] Bell Atlantic denies

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[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (*BNA Order*); *on recon.*, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Reconsideration and Petitions for Stay, CC Docket No. 91-115, 8 FCC Rcd 6393 (*First BNA Reconsideration Order*), *on further recon.* 8 FCC Rcd 8798 (1993) (*Second BNA Reconsideration Order*), *recon. pending.*

[2] *BNA Order*, 8 FCC Rcd at 4487 (para. 45).

[3] In the *First Reconsideration Order*, the Commission extended to February 9, 1994, the deadline for filing tariffs for the provision of the BNA information of customers with nonpublished or unlisted telephone numbers. *First Reconsideration Order*, 8 FCC Rcd at 6393 (para. 3). In the *Second Reconsideration Order*, this deadline was further extended to February 23, 1994. *Second BNA Reconsideration Order*, 8 FCC Rcd at 8810 (para. 69).

[4] *See* Billing Name and Address Tariffs of Local Exchange Carriers, Memorandum Opinion and Order, 8 FCC Rcd 8211 (Com. Car. Bur., Tariff Div. 1993); Nevada Bell, Revisions to Tariff F.C.C. No. 1, Pacific Bell, Revisions to Tariff F.C.C. No. 128, Order, 9 FCC Rcd 351 (Com. Car. Bur., Tariff Div. 1994). For purposes of this Order, we refer to the BNA associated with customers with listed telephone numbers as "listed BNA," and the BNA associated with customers with unlisted or nonpublished telephone numbers as "unlisted BNA."

[5] On March 10, 1994, AT&T and MCI also filed petitions to reject or suspend and investigate unlisted BNA tariffs filed by other LECs. Those tariffs, which have already taken effect, were addressed in separate Orders. Billing Name and Address Tariffs of Local Exchange Carriers for Subscribers with Unlisted or Nonpublished Telephone Numbers, DA 94-400 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994); Pacific Bell, Revisions to Tariff F.C.C. No. 128, DA 94-401 (Com. Car. Bur., Tariff Div., released Apr. 22, 1994). *See also* Anchorage Telephone Utility, Revisions to Tariff F.C.C. No. 5, DA-94-460 (Com. Car. Bur., Tariff Div., released May 6, 1994).

[6] MCI Petition at 1-3.

[7] *Id.* at 4-5, *citing* Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377 (1993) (*United Network Depreciation Order*). On May 24, 1994, Bell Atlantic informed the Tariff Division that it is withdrawing the exogenous cost treatment of which MCI complains, and recalculated its price cap indices accordingly. *See* Letter from Maureen Keenan, Bell Atlantic, to Chief, Tariff Division, Common Carrier Bureau, Federal Communications Commission, May 24, 1994 (*May 24 Letter*).

[8] AT&T Petition at 1-4.

[9] Bell Atlantic Reply at 2, *quoting* Section 64.1201(e)(3) of the Commission's Rules, 47 C.F.R. § 64.1201(e)(3).

[10] *Id.* at 3. Nevertheless, Bell Atlantic also states that it will provide the BNA of customers who have requested that their BNA not be disclosed to AT&T if the Commission determines that it is appropriate. *Id.* at 2-3.

[11] AT&T Petition at 3-5.

[12] *Id.* at 5-6.

[13] *Id.* at 6-7.

that withholding the BNA of subscribers who have requested that their BNA not be disclosed subjects AT&T to a risk of fraud.[14] Bell Atlantic also argues that LECs cannot distinguish between calling card, third party, and collect calls and other calls, and so they must restrict BNA disclosure of all end users who have requested that their BNA not be disclosed to remain in compliance with the BNA Rules.[15]

6. We have reviewed the BNA tariff and revision filed by Bell Atlantic, as well as all associated pleadings. We conclude that, as revised, Bell Atlantic's tariff is not so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.[16]

7. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by American Telephone and Telegraph Co. and MCI Telecommunications Corporation, against the transmittal captioned above, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[14] Bell Atlantic Reply at 2 n.5, 3 n.6, 4.
[15] *Id.* at 3-4.
[16] We note that several of the issues raised with respect to these tariffs are also raised in a petition for reconsideration of the *Second BNA Reconsideration Order*. Nothing in this Order should be interpreted to decide or otherwise prejudge these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-75

In re Applications of

TRINITY BROADCASTING OF FLORIDA, INC. — File No. BRCT-911001LY

For Renewal of License of
Station WHFT(TV)
Miami, Florida

and

GLENDALE BROADCASTING COMPANY — File No. BPCT-911227KE

For Construction Permit
Miami, Florida

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. Before the Commission is a May 7, 1993 Petition for Reconsideration of *Hearing Designation Order*, 8 FCC Rcd 2475 (1993) (*HDO*), filed jointly by the Spanish American League Against Discrimination (SALAD) and the League of United Latin American Citizens (LULAC).[1] We are dismissing the Petition for the reasons set forth below.

2. Section 1.106(a)(1) of the Commission's rules provides that petitions for reconsideration of hearing designation orders will be considered "if, and insofar as, the petition relates to petitioner's participation in the proceeding." It further provides that "[p]etitions for reconsideration of other interlocutory actions will not be entertained." 47 C.F.R. § 1.106(a)(1). Neither SALAD nor LULAC argues that their participation in this proceeding was affected by the *HDO*, and they have not demonstrated any reason that the Commission should depart from that provision of the rule otherwise precluding reconsideration. They argue that the aspect of the *HDO* they challenge is a "final" order subject to reconsideration, not an "interlocutory" order. We reject this argument.[2]

3. In the *HDO*, we determined that a hearing on the renewal application of Trinity Broadcasting of Florida, Inc.'s (Trinity) station WHFT(TV) is necessary to consider issues of unauthorized *de facto* control and abuse of Commission processes. At the same time, pursuant to *Grayson Enterprises, Inc*, 79 FCC 2d 936 (1980), we considered whether to call for early renewals or institute revocation proceedings against Trinity's other licensed stations.[3] We concluded that, on the evidence before us, we could not determine that the charges leading to designation of the WHFT license renewal application are so fundamental as to affect Trinity's qualifications to hold any station license. Therefore, we declined to take action against Trinity's other licenses and expressly stated that they are freely transferable pending the outcome of the WHFT proceeding.[4] *HDO*, 8 FCC Rcd at 2482 ¶ 45. SALAD and LULAC contend that this conclusion constitutes a "final" decision because they are now "conclusively barred from raising the issues designated in [the WHFT] proceeding" in any subsequent petition to deny transfer, assignment or renewal of other Trinity station licenses. SALAD and LULAC err. Assuming they both can establish standing, they are not precluded from opposing future Trinity applications, and action vis-a-vis such applications is "final" only when public notice of the action appears. *See* 47 C.F.R. § 1.103.[5]

4. *RKO General, Inc.*, 1 FCC Rcd 1081 (1986), cited by SALAD and LULAC for the proposition that they are precluded from raising the designated issues in petitions to deny future Trinity applications, should not be so broadly read. At issue there was an assignment application for RKO's station WOR-TV, Secaucus, New Jersey. The proceeding was unique in its circumstances because RKO, enmeshed in numerous charges of misconduct at various facilities, had just been granted a five-year renewal for WOR pursuant to action taken under a new section of the Communications Act, 47 U.S.C. § 331, enacted to encourage licensees to move to the state of New Jersey, which had no VHF outlet. Based on several factors, we concluded that Congress "intended to give a 'clean slate' to any qualifying

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[1] The Mass Media Bureau (MMB) filed a Motion to Dismiss the Petition on May 17, 1993 and Trinity Broadcasting of Florida, Inc. (Trinity) opposed the Petition on May 20, 1993. SALAD and LULAC filed a Reply to the Opposition on June 2, 1993.

[2] Trinity and the MMB argue that LULAC does not have standing to petition for reconsideration of the *HDO*. Since in any event we are dismissing the Petition pursuant to 47 C.F.R. § 1.106(a)(1), we need not address that argument here.

[3] *Grayson* required that, when the Commission designates a license application of a multiple owner for hearing, it simultaneously decide the transferability of his other stations, but any limit on transferability could be expressed either by including a statement in the designation order, attaching a condition on the renewal of the multiple owner's other stations, or designating the other stations for early hearing. *Grayson, supra*, 79 FCC 2d 940 at n.8. Subsequently the Commission modified *Grayson* to eliminate the option of conditioning other station license renewals on the outcome of the hearing, so that the Commission now either designates the licensee's other station licenses for early renewal or permits them to be transferred freely. *Modification of Grayson Enterprises Policy on Transferability*, 53 RR 2d 126 (1983).

[4] We made the same determination regarding stations licensed both to Trinity Broadcasting Network (TBN), an affiliate of Trinity, and to National Minority TV, Inc. (NMTV), to whom the charges specified in the *HDO* also related. However, since Petitioners challenge only our determination as to Trinity, we will limit our discussion to Trinity.

[5] In light of this ruling, we need not consider now SALAD and LULAC's further arguments that the portion of the *HDO* they challenge is a departure from established Commission policy.

licensee that volunteered to move." 1 FCC Rcd at 1083 ¶ 14. Therefore, we did not consider petitions to deny the assignment to the extent that they relied on alleged RKO misconduct prior to grant of the WOR license. *Id.*[6] However, we did consider petitions to deny to the extent that they relied on allegations of RKO misconduct occurring subsequent to grant of the WOR license and concluded that "a determination to permit [the] sale [was] amply supported ... as [a matter] of what will now best serve the public interest." *Id.* at 1084-1085. Similarly, we would grant future Trinity applications only after fully considering allegations raised in any petition to deny and making a reasoned determination that, despite those allegations, the public interest favors a grant.[7]

5. Accordingly, IT IS ORDERED, That the Motion to Dismiss filed by the Mass Media Bureau on May 17, 1993 IS GRANTED and the Petition for Reconsideration of *Hearing Designation Order*, 8 FCC Rcd 2475 (1993), filed May 7, 1993 by the Spanish American League Against Discrimination and the League of United Latin American Citizens IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[6] *See also Straus Communications, Inc.*, 2 FCC Rcd 7469, 7470 ¶ ¶ 7-8 (1987) (upholding Bureau decision to grant assignment application despite character issues designated against assignor in another proceeding when Bureau had considered allegations raised in informal objection to assignment and balanced public interest factors involved in light of allegations raised therein).

[7] *See* 47 U.S.C. § 309(d)(2) (requiring that an application be designated for hearing when a petition to deny raises substantial and material questions of fact). In this regard, we note that the *Grayson* policy by its own terms does not foreclose consideration of petitions to deny applications to renew, assign, or transfer simply because they are based on allegations pending in another proceeding. *Cf. Trinity Christian Center of Santa Ana, Inc.*, 8 FCC Rcd 4038 n.1 (1993) (indicating in response to allegations raised in a petition to deny renewal application of Trinity's WHSG(TV) that, though issues raised would not be specified or adjudicated in the WHSG proceeding because they are already under consideration in this Miami proceeding, any grant of the WHSG application "shall be subject to whatever action the Commission deems appropriate in light of the final resolution of issues ... specified in the *Hearing Designation Order* in the Miami proceeding").

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Request
for Declaratory Ruling

Filed by Satellite CD Radio, Inc. File No. 12-DSS-MISC-94

DECLARATORY ORDER

Adopted: May 31, 1994; Released: June 8, 1994

By the Acting Chief, Common Carrier Bureau:

1. Satellite CD Radio Inc. (CD Radio) has filed a Request for a Declaratory Ruling or Waiver to permit the public offering of a substantial portion of the stock in its parent corporation without jeopardizing its position as an applicant for authorization in the proposed Digital Audio Radio Service (DARS).[1] The National Association of Broadcasters has opposed CD Radio's request. For the reasons set forth below, we grant CD Radio's request, subject to conditions.

I. BACKGROUND

2. In its request CD Radio states that its parent corporation proposes to issue 4,500,000 new shares of common stock in order to raise capital to finance its continuing efforts to obtain Commission authorization to provide digital audio radio service.[2] According to CD Radio, the new shares issued in connection with the public offering will represent a minority of its parent corporation's outstanding stock but, together with other post cut-off transactions, the offering may have the result that individuals and entities who were stockholders at time of cut-off own less than 50% of the outstanding shares. CD Radio states it believes that no Commission rule or policy would prohibit or penalize its proposed sale of stock but is filing this request "out of an abundance of caution" because such a financial transaction might be viewed as a major change in control of the applicant. Accordingly, CD Radio requests a ruling that Section 25.116 of the Commission's rules, 47 C.F.R. §25.116,[3] does not apply to DARS applications. In the alternative, CD Radio asks the Commission to grant an exemption from the rule's application to the proposed transaction, pursuant to Section 25.116(c)(2).

3. CD Radio advances several arguments in support of its claim that Section 25.116 does not apply to DARS applications. First, it contends that because the Commission has not adopted specific rules to govern DARS, it is uncertain whether Section 25.116 or any similar rule will ever apply to this application. Secondly, CD Radio argues that the Commission in the October 1992 Public Notice of the DARS applications announced that applicants will be afforded an opportunity to amend their applications to conform with any adopted rules and policies. CD Radio contends that it would be inconsistent with this ruling for the Commission to take any action that could result in the dismissal of an application pursuant to a rule that might not ultimately apply. For these reasons, CD Radio asserts, the Commission should confirm that the proposed stock issuance will not require the filing of a major amendment or affect the cut-off status of its application.

4. If the Commission should determine that Section 25.116 does apply to DARS applications, CD Radio urges the Commission to grant an exemption pursuant to subsection (c)(2) of that rule. In support of this alternative approach, CD Radio alleges that there is no evidence that it either is engaged in trafficking or has undertaken a plan for selling control to third parties.[4] CD Radio further represents that after the consummation of the proposed stock issuance, the same individuals and entities will remain as major stockholders of the parent corporation and the same management and operational team will continue to run the company. Moreover, CD Radio states that the proposed transaction does not alter its service proposal. The additional capital will be used to continue its experimental program and underwrite its regulatory efforts to obtain a license and ultimately to begin satellite construction. CD Radio further asserts that policy considerations underlying restrictions on pre-license transfers of control do not apply in the satellite area where technical and operational plans, and not necessarily ownership structure, are the primary focus. Finally, CD Radio asserts that its proposal is consistent with Commission policies on financial qualifications, particularly in the satellite area, where costs and lead times are so significant and licensees in new services are rarely self-financed and need substantial amounts of capital to pursue their proposals.

5. CD Radio also contends that grant of the requested exemption is consistent with Commission precedent, particularly *Starsys Global Positioning, Inc.* (*Starsys*).[5] CD Radio argues that here, as in *Starsys*, the proposed financial

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[1] On October 13, 1992, a Public Notice was issued announcing a cut-off date of December 15, 1992 for filing DARS applications. In addition to CD Radio's, five applications were filed. Two of these have subsequently been withdrawn. The remaining DARS applicants are: Satellite CD Radio, Inc.; Primosphere Limited Partnership; American Mobile Radio Corp.; and Digital Satellite Broadcasting Corp.

[2] CD Radio has filed the appropriate documents with the Securities and Exchange Commission to permit it to go forward with this stock offering.

[3] 47 CFR §25.116 provides in pertinent part that an amendment will be considered major if it specifies a substantial change in beneficial ownership or control of the applicant that would require the filing of a prior assignment or transfer of control in the case of an authorized station. The rule further provides that any application will be considered to be a newly filed application if it is amended by a major amendment after a "cut-off" date applicable to the application. Under certain circumstances, however, for example if the amendment reflects only a change in ownership or control found by the Commission to be in the public interest, the Commission may grant an exemption from the "cut-off" date.

[4] Concern about applicants selling interests in bare licenses or applications is a primary reason for cut-off dates and prohibitions of major amendments after those dates. *See* Airsignal International Inc., 81 FCC 2d 472 (1980).

[5] 8 FCC Rcd 1662 (Dom. Fac. 1993). In *Starsys*, the Domestic Facilities Division ruled that the transfer of an ownership interest in the applicant would, if deemed to be a major amendment of its application, qualify for an exemption from the cut-off date

transaction will serve a legitimate business purpose, namely raising capital needed to continue pursuit of its application and operation of its experimental program. In addition, CD Radio alleges that its proposal meets the public interest test of *Starsys* by enhancing the applicant's financial strength and its ability to become a provider of DARS while not prejudicing the other applicants in the proceeding. CD Radio cites a recent letter to the Commission signed by three of the four parties indicating their belief that their applications are not mutually exclusive and that all DARS applicants could be accommodated in the amount of spectrum proposed to be allocated.[6]

II. COMMENTS

6. NAB opposes CD Radio's request, primarily on the ground that CD Radio has failed to make a showing that would justify a waiver of Section 25.116.[7] NAB states that CD Radio has ynot provided the Commission with sufficient information regarding the impact that issuance of the new stock will have on its ownership. NAB also claims that information provided to the SEC indicates that two entities holding a total of 60% of the stock at the time of the cut-off no longer own any stock. NAB states that numerous significant changes in ownership have occurred and these should be discussed in greater detail because the Commission has not yet determined whether restrictions on alien ownership will apply to this service. NAB disputes CD Radio's claims that the transaction furthers a legitimate business purpose and that other applicants will not be prejudiced.[8] NAB also states that the portion of the S-Band proposed to be allocated to satellite DARS may be needed for implementation of digital technology for terrestrial services and thus other applicants who might propose terrestrial service might be prejudiced by grant of a waiver. Finally, NAB argues that the Commission should be wary of granting waivers or special requests that build equities which may prejudice its process or color its public interest determinations in favor of certain applicants.

7. In reply, CD Radio states that NAB has pleaded no facts or policies to show that it or its members will be hurt by grant of this request. According to CD Radio, cut-off rules are designed to protect other competing applicants and none of the other DARS applicants has opposed its request. CD Radio asserts that NAB's complaint concerns the establishment of the service in general, not the status of CD Radio's application. CD Radio further states that NAB ever requested allocation of S-Band frequencies for terrestrial users and current plans call for broadcasters to use in-band technology to implement digital service.[9] Even if its request is denied, CD Radio asserts, three DARS applicants will remain viable and thus NAB still cannot obtain the relief it seeks, namely the possible reservation of S-Band spectrum for terrestrial broadcasters. Finally, CD Radio challenges NAB's assertions that substantial ownership changes have occurred since the cut-off date. According to CD Radio, the principal stockholders at cut-off still own over 50% of the stock. The only change that has occurred is the transfer to a spouse by one shareholder with less than a 40% interest.[10] CD Radio asserts that grant of its request will not impair the Commission's ability to make appropriate public interest determinations.

III. DISCUSSION

8. The Commission, in its October 13, 1992 Public Notice, announced its intention to use the processing rules in Part 25 to process DARS applications, pending adoption of specific service rules. Even if other rules are ultimately applied to this service, policies regarding major amendments and cut-off dates that are based on general Commission practices would be similar. Accordingly, we conclude that if CD Radio's stock offering produced a substantial change in the beneficial ownership of the company, CD Radio would be required to file a major amendment to its DARS application.

9. Although CD Radio argues that Section 25.116 should not be applied to the DARS proceeding, it does not deny that its proposed transaction could result in a substantial change in beneficial ownership of CD Radio as defined by that section of the Commission's Rules. Until the proposed stock transaction has taken place, it is impossible to determine exactly how the ownership structure of the company will change. Nonetheless, because of the amount of the stock involved, it is possible that the change will be substantial. Thus, CD Radio will be required to file an amendment to its application if necessary to reflect any such substantial change in beneficial ownership. We now consider whether such an amendment should be exempt from Section 25.116(c)(2) that would require the amended application to be treated as newly filed.

10. We disagree with NAB that CD Radio has provided insufficient information on which to base a ruling on its requested exemption. The amended Form 430 reflects previous ownership changes as described by CD Radio. Further, the Commission has not yet determined whether any alien ownership rules will apply to satellite delivered DARS. The proposal filed by CD Radio is for non-common carrier subscription service and, as proposed, would not implicate the ownership restrictions in Section 310 of

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in the licensing proceeding for non-voice, non-geostationary mobile-satellite services in frequencies below 1 GHz. *See also*, Airsignal International, Inc., *supra* n.4; ISA Communications Services, Inc., 90 FCC 2d 938 (1982).

[6] This letter also states that the fourth applicant only requests 10 MHz of spectrum and thus can be accommodated regardless of the particular sharing plan adopted. *See* Letter to Chief, Satellite Radio Branch, from Richard E. Wiley, Douglas J. Minster, and Howard Liberman, November 17, 1993. None of the other applicants opposed CD Radio's Request for Declaratory Ruling or Waiver. The Commission has issued an NPRM proposing to allocate 50 MHz of spectrum in the S-Band for provision of satellite-delivered DARS. *See* Amendment of the Commission's Rule with Regard to the Establishment and Regulation of New Digital Audio Radio Services, (*NPRM*) 7 FCC Rcd 7776 (1992).

[7] NAB states that CD Radio does not seriously dispute the fact that Section 25.116 applies here and notes that the applicant's SEC filing acknowledges that the transaction would be a major amendment to its DARS application for which an FCC exemption would be necessary.

[8] NAB cites the fact that American Mobile Radio Corporation did not sign the letter referenced in n.6.

[9] *See NPRM*, *supra* n.6.

[10] This change was reflected in an updated Licensee Qualification Form 430 filed October 1, 1993, showing that a substantial portion of Robert Friedland's stock held in 1992 is now held by Darlene Freidland, identified as his spouse.

the Communications Act. It would be premature in this context to decide whether ownership restrictions will apply to DARS. Moreover, a delay in the stock offering might seriously prejudice CD Radio's financial position. As stated in the October 1992 Public Notice, applicants will be given an opportunity to amend their applications to conform to any adopted rules or policies.

11. Based on our review of the facts and cirumstances presented in this case, we conclude that if an amendment is filed that reflects a substantial change in beneficial ownership, this is an appropriate case in which to grant an exemption under Section 25.116 (c)(2). In *Airsignal*,[11] the Commission used a two-part test to determine if a waiver of the cut-off date should be granted: 1) whether the proposed transaction has a legitimate business purpose; and 2) whether the change in ownership is in the public interest. CD Radio's request meets this test. First, it is clear that the stock offering has a legitimate business purpose, namely to provide continuing financing to allow the company to pursue its application. CD Radio has represented that the management and operational team will remain the same, as will the applicant's service proposal. We understand these representations to mean that the current principals in CD Radio will remain in actual control of the applicant. We also find no basis in the record to believe that CD Radio is trafficking in bare applications or that it is planning to sell control to third parties, particularly in light of the fact that the new shares represent a minority of the outstanding stock. On the contrary, the record evidence indicates that CD Radio's parent intends to use the offering to obtain funds from a legitimate and traditional source of capital in order to finance its activities relating to CD Radio.[12] We note that operation of an experimental program and prosecution of a request for Commission authorization of a new communications facility can require substantial sums of money when satellite facilities are involved.

12. Second, we find that grant of an exemption from the cut-off date would serve the public interest. It would allow CD Radio the opportunity to strengthen its financial resources and enhance its chances of becoming a provider of DARS service. Such a result would increase the probability that the public will benefit from the eventual provision of this service, if authorized. Further, other DARS applicants would not be harmed by such a grant, as evidenced by the fact that none has opposed it. The purpose of cut-off rules is to protect other applicants in the relevant proceeding. Neither NAB nor its members are part of the protected group because they have not filed applications to provide satellite DARS. Finally, NAB's concern that finding in CD Radio's favor might prejudice this proceeding is unfounded. The Commission has not decided whether to allocate spectrum for the purpose of establishing a Digital Audio Radio Service. Even if it were to establish such a service, there is no assurance CD Radio would receive a license to provide such service. Grant of the requested exemption would merely permit CD Radio to proceed with its individual financing arrangements. We, therefore, conclude, pursuant to Section 25.116(c)(2) of the Commission's rules, 47 C.F.R. § 25.116(c)(2), that if CD Radio's stock offering results in a change in beneficial ownership that necessitates the filing of a major amendment to its DARS application, grant of an exemption from the DARS cut-off would be in the public interest. This determination is without prejudice to any future action the Commission may take on any DARS application.

IV. CONCLUSION

13. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. 0.291, that the request of CD Radio, Inc. for an exemption IS GRANTED, and that the issuance of 4,500,000 shares of stock in its parent corporation will not result in a determination that the application is newly-filed pursuant to Section 25.116(c) of the Commission's rules. This ruling is conditioned on the current stockholders and officers of the parent corporation continuing to exercise actual control over CD Radio, Inc.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

[11] *See supr a*, n.4; see also ISA Communications, *supra* n.5.
[12] CD Radio states it already has invested more than $10 million in the enterprise.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-107

In re applications of

DAVID A. RINGER	File No. BPH-911230MA
ASF BROADCASTING CORPORATION	
WILBURN INDUSTRIES, INC.	File No. BPH-911230MC
SHELLEE F. DAVIS	File No. BPH-911231MA
WESTERVILLE BROADCASTING COMPANY LIMITED PARTNERSHIP	File No. BPH-911231MB
OHIO RADIO ASSOCIATES, INC.	File No. BPH-911231MC

For construction permit for
an FM station on Channel 280A,
in Westerville, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

1. On September 23, 1993 the Commission released a notice pursuant to 47 C.F.R. §1.80(f) and (g)(3) to advise Westerville Broadcasting Company Limited Partnership (WBC) that the Commission had information indicating that WBC may have misrepresented material facts with deceitful intent in a pleading filed on June 9, 1993, in violation of 47 C.F.R. §1.17, that a determination of liability would be made unless WBC were to remit $25,000 within thirty days, and that WBC would be allowed thirty days in which to file a response. 8 FCC Rcd 7037 (1993). WBC filed a response on October 22, 1993 and an erratum on October 25, 1993.

2. WBC was one of seven applicants for a new Class A FM station at Westerville, Ohio that were designated for hearing in April, 1993. The official application form that it used required the applicant to indicate by checking "yes" or "no" whether it had enough net liquid assets or funds available through borrowing from committed creditors to construct the proposed station and operate it for three months without revenue. WBC represented in its application that it would need a total of $300,000 to fund construction and operation for three months, and it checked the "yes" box to attest that it had enough available funds to meet that need.

3. On May 10, 1993, pursuant to the discovery provisions of 47 C.F.R. §1.325(c)(1), WBC produced various documents, including a one-page "Construction Summary" listing ten expense categories and giving dollar estimates for each, amounting to a total of $293,000. A competing applicant subsequently called attention to the fact that WBC's cost summary said nothing about the expenses of the first three months of operation and contended that a hearing issue should therefore be specified concerning the veracity of WBC's financial certification. WBC responded to that contention in an opposition pleading filed on June 9, 1993, denying that it had neglected to include three-months' operating expenses; it alleged, rather, that the principal who had prepared the cost summary, WBC general partner Freeman Edwards II, had made allowance for such expenses by including an estimate of them in the $39,000 amount identified in the summary as "Miscellaneous, spares, and contingency." It is to this allegation that we specifically referred when we notified WBC that it was apparently liable for misrepresenting facts in its June 9 opposition pleading.

4. We conclude in light of WBC's response that an assessment of liability is unwarranted. WBC asserts that in preparing its cost statement Edwards followed the format of a sample cost summary in a brochure that had been prepared for the FCC and distributed to members of the public at an FCC-sponsored seminar that he had attended. The brochure advised that applicants must certify that enough liquid assets are available for construction and operation of their proposed facilities for three months without revenue and referred to the sample cost summary as an illustrative set of cost estimates for a Class A FM station, such as WBC proposed. None of the numerous expenses itemized in the sample cost summary was specifically identified as operating expenses. The line items in the sample cost summary were grouped into three general categories: "Transmitter Plant," "Studio Equipment," and "Other," and the last item in the "Other" category was an entry designated "Miscellaneous, spares and contingency." Significantly, a note on the sample cost summary explaining that certain enumerated kinds of expenses were *not* included made no reference to operating expenses, and the indicated expense of "Miscellaneous, spares and contingency" was larger than any other itemized expense listed in the sample, comprising approximately fourteen percent of the overall total. An inference might understandably be drawn from these indications that the "Miscellaneous, spares and contingency" entry included an allowance for operating expenses, notwithstanding the entry's literal inaptness for that purpose. In view of these circumstances, and in view of the fact that no question was ever raised as to the adequacy of WBC's overall cost estimate, we find that WBC's explanation is plausible. Hence, we hold that there are insufficient grounds in the information before us for concluding that WBC made an actionable misrepresentation in asserting in its June 9, 1993 pleading that it had made allowance for its expected initial operating expenses in its summary of estimated expenses.

5. ACCORDINGLY, IT IS ORDERED, pursuant to 47 C.F.R. §1.80(f)(4), that the forfeiture inquiry against Westerville Broadcasting Company Limited Partnership (File No. BPH-911231MB) instituted by notice of potential liability, 8 FCC Rcd 7037 (1993), IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1994

Ameritech, Pacific Bell and Nevada Bell File Petition for Waiver of the Commission's Transport Rules (CC Docket No. 91-213)

Pleading Cycle Established

COMMENTS DUE: June 13, 1994
REPLIES DUE: June 20, 1994

In December 1993, Ameritech Operating Companies (Ameritech), and Pacific Bell and Nevada Bell (Pacific) were granted waivers delaying the implementation of the Commission's interim transport rate structure rules to July 1, 1994. On May 17, 1994, Pacific filed a petition to further extend this waiver to November 1, 1994. In addition, on June 1, 1994, Ameritech filed a petition for waiver seeking an extension of its waiver of the interim rate structure rules from July 1, 1994, to February 1, 1995. Ameritech and Pacific contend that they need this additional time to revise their billing systems for the new rate structure.

Interested parties filing comments or oppositions to any of these petitions are invited to do so no later than **June 13, 1994**. Parties filing replies may do so no later than **June 20, 1994**. An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of these petitions and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

O.D.T. INTERNATIONAL
For Voluntary Assignment of
License of Station KILU(FM),
Paauilo, Hawaii — File No. BALH-911216HO

In re Application of

WYMAN W.C. LAI, TRUSTEE
For Involuntary Assignment of
License of Station KILU(FM),
Paauilo, Hawaii — File No. BALH-920812HV

In re Application of

WYMAN W.C. LAI, TRUSTEE (Assignor)
and
CHARLES R. CRAWFORD (Assignee)
For Voluntary Assignment of
License of Station KILU(FM),
Paauilo, Hawaii — File No. BALH-930527GG

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 1994; Released: June 9, 1994

By the Commission (Commisioners Chung and Ness not participating):

1. The Commission has before it: (i) an application for review, filed on January 8, 1993 by O.D.T. International ("ODT") of the November 30, 1992 action by the Mass Media Bureau ("Bureau") which dismissed its application for voluntary assignment of station KILU(FM), Paauilo, Hawaii and granted the application of Wyman W.C. Lai, Trustee ("Lai") for involuntary assignment of the station; and (ii) related responsive pleadings.[1] The Commission will also address herein the application (File No. BALH-930527GG) for voluntary assignment of the license and assets of KILU(FM) from Lai to Crawford.

2. *Background.* Station KILU(FM) was formerly licensed to Hamakua Broadcasting Corporation ("Hamakua"), a company controlled by Paul Yang. The station has been silent since November of 1991, initially based upon "continuing litigation between and among the present and former owners" and a lightning strike which destroyed the transmitter and other associated equipment.[2]

3. On December 16, 1991, ODT filed the captioned "short-form" application for voluntary assignment of the KILU license and assets from Hamakua to ODT, a corporation also wholly owned by Mr. Yang. Crawford filed an informal objection to the proposal on January 7, 1992, claiming essentially that: (i) he had been awarded summary judgment by the federal district court in Hawaii for a $180,000 debt owed him by Hamakua; and (ii) "if Hamakua is permitted to effectuate an insider trading of the corporate assets so as to gut Hamakua by transferring from it the FCC license, then the effect will be to defraud creditors and subvert the pending lawsuit commenced in order for Mr. Crawford to obtain return of the monies owed him."[3] While that application was pending at the Commission, Crawford instituted an involuntary bankruptcy proceeding in the United States Bankruptcy Court for the District of Hawaii ("Bankruptcy Court"). On June 12, 1992, the Bankruptcy Court appointed Lai as the trustee for Hamakua, and on August 14, 1992, Lai filed with the Commission an application for involuntary assignment of KILU. Attached as part of the application was an Order from the Bankruptcy Court dated June 12, 1992, appointing Lai as trustee.

4. The Bureau granted Lai's application and dismissed the application for assignment to ODT, finding that the Commission has in the past held that a fair accommodation must be reached between state and federal courts which have authority over contractual matters, and the Commission, which has exclusive authority over the licensing of broadcast stations.

5. *The pleadings.* In its application for review, ODT states that the dismissal of its application and the grant of Lai's application were based on errors of fact and law. According to ODT, the Bankruptcy Court had never ordered that the KILU license be transferred to the trustee but merely appointed Lai to be trustee. ODT also argues that there was at all relevant times a counterclaim pending in the District Court by Hamakua against Crawford, and Crawford "has never ... established his entitlement to any amount which is not offset by his obligations to Hamakua." ODT continues that:

> [t]he only possible purpose of the assignment [of the KILU license to the trustee] would be to convey [it] as an asset of the bankrupt estate to satisfy creditors. It would not be an asset of Hamakua, much less of the bankrupt estate, if the application of ODT had

[1] These include: (i) the Opposition to Application for Review filed on February 2, 1993 by Charles R. Crawford ("Crawford"); and (ii) Lai's "Response" to the application for review, filed on January 27, 1993.

[2] On November 22, 1991, the station was granted special temporary authority to remain silent through February 22, 1992. The authority has been extended several times, most recently through January 29, 1994.

[3] Crawford also filed in its civil suit a request for a temporary restraining order prohibiting the assignment to ODT. This request was denied by the District Court. *Charles R. Crawford v. Hamakua Broadcasting Corporation*, Civil Action No. 91-00140 DAE, *Order* dated January 13, 1992.

> been properly adjudicated in the first place, and ODT has a superior entitlement to assignment of the license of KILU....

Furthermore, states ODT, the trustee is not entitled to the license, because, since the Commission is invested with exclusive authority over the disposition of broadcast licenses, it is not an asset of the bankrupt estate, citing *In re: D.H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bankr. N.D. Ohio 1983); *In re: Twelve Seventy, Inc.*, 6 RR 2d 301 (1965).; *Radio Station WOW v. Johnson*, 326 U.S. 120, 131-132 (1945); and *Radio KDAN*, 11 FCC 2d 934, *recon. denied*, 13 RR 2d 100 (1968), *aff'd on procedural grounds sub nom. W.H. Hanson v. FCC*, 413 F. 2d 374 (D.C. Cir. 1969). While ODT admits that the Commission's usual procedure is to allow the involuntary assignment of license to a receiver pending disposition of the assets and assignment of the license to a Commission-approved third party, citing *LaRose v. FCC*, 494 F. 2d 1145 (D.C. Cir. 1974), it argues that the only purpose of the assignment to a trustee in bankruptcy "is the theory that the bankrupt no longer has the financial wherewithal to operate the station and is no longer financially qualified. *Kirk Merkley, Receiver*, 56 RR 2d 413 (1984)." Here, states ODT, there was a proper application to assign the license to an entity which was "indisputably" financially qualified, and only if its application was denied did the Trustee have any entitlement to adjudication of its own application.[4]

6. In opposition, Crawford states that there is no authority for ODT's proposition that its "first in time application" takes precedence over the Bankruptcy Court's intervention, and argues that "|t|he ODT application should be reviewed for what it is, a bad faith obstructionist tactic." Lai also responded to the application for review, arguing that after January 21, 1992, when Hamakua was forced into bankruptcy, any sale to ODT would, under bankruptcy law, require Bankruptcy Court approval. Lai also notes that ODT could have bid against Crawford in the bankruptcy proceeding.

7. *Discussion.* We will deny the application for review. Although ODT correctly notes that the Bankruptcy Court order appointing Lai trustee did not compel the Commission to grant Lai's application,[5] ODT has offered no valid reason why the Bureau's decision to grant the application was improper in this case. The Bureau appropriately took into account the existence of the Bankruptcy Court order, and the federal policies favoring protection of creditors which underlie the bankruptcy laws, in making its decision to grant the Lai application. *See LaRose v. FCC*, 494 F. 2d 1145 (D.C. Cir. 1974). Further, the Commission, in cases of federal and state bankruptcy proceedings involving the assets of broadcast stations, routinely grants trustees or receivers consent to acquire broadcast licenses on a temporary basis pending disposition of station assets. We recognize that these assets would be of comparatively little value if the Commission did not permit the operating authorization to accompany them pending ultimate passage of all to a qualified buyer.

8. Thus, we also conclude that the Bureau properly dismissed the application to assign KILU to ODT. In light of the ongoing bankruptcy proceeding involving the assets of KILU, we do not believe the public interest would be served by permitting a licensee in bankruptcy to assign its license for nominal consideration to a new legal entity. Nor do we believe that such a position is contrary or inconsistent with the regulatory interests of the Commission. Even assuming *arguendo* that ODT is financially qualified, approval of its proposal would appear to sanction an evasion of federal policies underlying the bankruptcy laws. Unless a public interest determination compels a different result, the Commission attempts to accomodate such policies. *See Arecibo Radio Corporation*, 101 FCC 2d 545 (1985).[6]

9. Additionally, we reject ODT's contention that the pendency of a counterclaim by Hamakua against Crawford should alter this decision. The validity of that claim and its effect, if any, on the bankruptcy proceeding are matters best resolved in other fora. It is not properly our role to hear what amounts to appeals concerning such matters. It has been consistently held that the Commission is not the proper forum for resolving contractual disputes, *see Regents v. Carroll*, 338 U.S. 586 (1950), and we have consistently indicated that controversies which do not reflect upon the qualifications of a Commission licensee are best left to the local courts for resolution. *See Sonderling Broadcasting*, 46 RR 2d 889, 894 (1979); *Mid-Texas Broadcasting*, 71 FCC 2d 1173, 1174 (1979).

10. *The Lai-to-Crawford application.* We have examined the uncontested voluntary application for assignment of KILU to Crawford, and we find that Crawford is fully qualified to be the licensee of KILU(FM). Additionally, we find that grant of the application will further the public interest, convenience and necessity by facilitating the resumption of broadcasting by KILU.[7]

11. Accordingly, in light of the above findings, the application for review filed by O.D.T. International IS DENIED, and the application (File No. BALH-930527GG) to assign station KILU from Wyman W.C. Lai to Charles R. Crawford IS GRANTED, subject to the following condition:

> Grant of this application is subject to the condition that the assignment covered by File No. BALH-930527GG) will be consummated within sixty (60) days of the date of grant, and that the Commission

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[4] ODT alleges that, on November 13, 1992, prior to the time the Commission granted Lai's application, Lai had agreed to assign the KILU license and assets to Crawford. We find no basis in these allegations to pursue this matter further.

[5] As ODT points out, the Commission has historically held that a broadcast license is not an owned asset or vested property interest that is subject to third party security interests. *See Kirk Merkley*, 94 FCC 2d 829 (1983); *Radio KDAN*, 11 FCC 2d 934, *on recon.*, 13 RR 2d 100, 102 (1968), *aff'd on other grounds sub nom. Hanson v. FCC*, 413 F. 2d 374 (D.C. Cir. 1969). *Cf. Notice of Proposed Rulemaking and Notice of Inquiry*, 7 FCC Rcd 2654 (1992).

[6] We further note that KILU has remained silent under Mr. Yang's stewardship since at least 1991, and that ODT has not attempted to demonstrate that it can or will resume KILU's broadcast operations promptly.

[7] The Bankruptcy Court approved the agreement to sell KILU to Crawford for $310,000, "less the amount of the credit bid and any advances made on behalf of the buyer." *Order Approving Trustee's Application to Assign Ulupalakua Ranch License Agreement, Transfer Debtor's Rights in Federal Communications Commission Broadcasting License and Sell Personal Property Free and Clear of All Liens and Encumbrances Filed on December 8, 1992*, Case No 92-00049 (Bankr. Hawaii May 18, 1993).

will be notified of such consummation within one (1) day thereafter; and that the station will resume broadcasting within sixty (60) days after consummation of the grant of the assignment, and that the Commission will be notified of the resumption of broadcasting within one (1) day thereafter.

FEDERAL COMMUNICATIONS COMMISSION

William Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-46

In the Matter of

Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Services	RM 8367

In re Requests of

Paging Network, Inc.	MSD 93-31
PacTel Paging	MSD 93-32
Arch Communications Group, Inc.	MSD 93-33
Metrocall, Inc.	MSD 94-5
American Paging, Inc.	MSD 94-6
Mid-Atlantic Paging Company, Inc.	MSD 94-7
MobileMedia Communications, Inc.	MSD 94-11

For Waiver of Section 22.119 of the Commission's Rules to Permit Concurrent Licensing of Paging Transmitters under Part 22 and Part 90 of the Commission's Rules

NOTICE OF PROPOSED RULE MAKING
AND
ORDER

Adopted: May 13, 1994; Released: June 9, 1994

Comments Due: July 11, 1994
Reply Comments Due: July 26, 1994

By the Commission:

I. INTRODUCTION

1. By this Notice of Proposed Rulemaking we propose to delete Section 22.119 of the Commission's Public Mobile Service Rules, 47 CFR 22.119, which prohibits the concurrent licensing and use of transmitters for common carrier and non-common carrier purposes. We propose to permit the joint licensing and use of transmitters in the common carrier and private carrier services. In addition, we are granting interim waivers of Section 22.119 to Paging Network, Inc. (PageNet), PacTel Paging (PacTel), Arch Communications Group, Inc. (Arch), Metrocall, Inc. (Metrocall), American Paging, Inc. (API), Mid-Atlantic Paging Company Inc. (Mid-Atlantic) and MobilMedia Communications, Inc. (MobileMedia)[1] to the extent set forth below, during the pendency of this rulemaking. This action will allow them to use transmitters presently licensed for common carrier paging purposes to also provide private carrier paging service.

II. BACKGROUND

2. Section 22.119[2] of the Commission's Rules prohibits the concurrent licensing and use of a transmitter to provide common carrier services under Part 22 of the Rules for non-common carrier communication purposes. Although the regulatory history is silent on the purpose of this rule, we believe that the original intent of Section 22.119 was to assure that the capacity of radio common carrier transmitters is devoted to common carrier services in an effort to protect subscribers to these services from unnecessary delays and interruptions in service.[3]

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[1] *See* Request for Waiver filed by Paging Network, Inc., April 6, 1993; amended July 15, 1993 and November 2, 1993 (PageNet Waiver Request); Request for Waiver filed by PacTel Paging, August 31, 1993 (PacTel Waiver Request); Request for Waiver filed by Arch Communications Group, Inc., September 22, 1993 (Arch Waiver Request); Request for Waiver filed by MetroCall Inc., November 30, 1993 (Metrocall Waiver Request); Request for Waiver filed by American Paging Inc., December 10, 1993 (API Waiver Request); Request for Waiver filed by Mid-Atlantic Paging Company, December 7, 1993 (Mid-Atlantic Waiver Request) and Request for Waiver filed by MobilMedia Communications, Inc., March 7, 1994 (MobileMedia Waiver Request). Each company currently is a licensee of numerous Part 22 and Part 90 facilities. As explained below, a grant of these waivers will serve the public interest.

[2] Section 22.119 (1992) states:

> Transmitters licensed for operation in services governed by this part [22] may not be concurrently licensed or used for non-common carrier communication purposes. However, mobile units may be concurrently licensed or used for non-common carrier purposes provided that the transmitter is type-accepted for use in each service.

[3] This rule was originally in Part 21 of the Commission's Rules, and was incorporated into Part 22 in 1979 when the public mobile service and public fixed service rules were separated into discrete rule parts. *See Domestic Public Fixed Radio Services and Public Mobile Radio Services*, FCC Docket No. 79-595, 46 RR 2d 652 (1979). The rule section was carried over into the major revision of Part 22 in 1983, but largely without comment. *See Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC 2d 769 (1983).

III. DISCUSSION

3. Several developments in the mobile communications industry have made it appropriate to reevaluate the Section 22.119 prohibition. Advances in technology have caused transmitter capacity to increase significantly. For example, improvements in digital transmission techniques and increases in transmission rates, coupled with advanced store and forward technologies,[4] enable a single transmitter to serve over 300,000 paging units. According to PacTel, it is working with manufacturers to develop 6400 bits per second (bps) transmission rates which will accommodate over 800,000 subscribers on a single paging channel.[5] PageNet states that it currently has deployed technology which can accommodate 400,000 paging units on a single 25 kHz channel.[6] These dramatic increases in capacity reduce the need for a transmitter to be devoted on a full time basis to common carrier uses in order to provide high quality service to the public, particularly in markets where total capacity exceeds current demand.

4. To meet marketplace demand for wider-area coverage, some licensees have begun to offer regional and national private carrier paging service as an overlay to their more localized common carrier paging services. The present rule requires such carriers to construct dedicated private carrier facilities which are duplicative of their existing local systems, thereby imposing unnecessary costs on carriers, which could result in higher subscriber charges.[7] The impact of these unnecessary costs is likely to be exacerbated because we expect the penetration rate for nationwide and broad regional services to be lower at the outset than for long established local services. In markets where an operator's local common carrier transmitters are not loaded to capacity (*e.g.*, in markets the licensee has recently entered or in smaller markets) there are substantial economies the licensee could obtain by initially sharing transmitters when building out a regional or nationwide system without in any way diminishing the licensee's current or projected quality of service. Under these circumstances, the present requirement of Section 22.119 appears to be contrary to recent Commission actions which encourage licensees to devote unused capacity to auxiliary or incidental communications services that will meet public needs.[8]

5. The Omnibus Budget Reconciliation Act of 1993 (the 1993 Budget Act)[9] enacted by Congress further amends Section 3(n) and Section 332 of the Communications Act of 1934 to create a comprehensive regulatory framework for all mobile services, including existing Part 22 common carrier mobile services, private land mobile services, and future services, such as Personal Communications Services (PCS). The 1993 Budget Act also amends the Communications Act to specify a single "commercial mobile radio service."[10] We have since adopted a comprehensive Order implementing the basic provisions of Sections 3(n) and 332 of the Act, as amended by the 1993 Budget Act.[11] In addition, we recently adopted a Further Notice of Proposed Rulemaking that begins the process of conforming technical, operational, and licensing rules applicable to commercial mobile radio service (CMRS) providers that are subject to Part 22 and Part 90 of the Commission's Rules.[12] We do not believe that anything in the legislation or rulemaking is inconsistent with our proposal here.

6. Finally, the paging industry has become increasingly competitive. Allocations of new spectrum,[13] the relaxation of federal and state barriers to entry,[14] and the growth of subscriber demand have resulted in numerous well-financed competing paging entities in virtually every market. These companies compete on the basis of geographic service area, customer service, enhanced services, and price. This highly competitive environment encourages paging carriers to provide an acceptable quality of service or risk losing customers to competitors. These competitive incentives provide us with additional assurances that service to existing customers will not suffer from the joint use of transmitters.

7. Because of these developments, we tentatively conclude that permitting a single transmitter to operate on both common carrier and private carrier channels will not disrupt or impair service to existing Part 22 subscribers. Nevertheless, we seek comment whether Section 22.119 should be retained but modified to permit the concurrent use of transmitters in the common carrier and non-common carrier services in limited circumstances. For example, we could permit the joint use of transmitters licensed under Part 22 only where carriers are offering services that are different in kind (*e.g.*, nationwide vs. regional service; local vs. regional service). Another option is to permit such

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[4] Under store and forward technology, pages are batched and then sent as a group. The transmission time is the same regardless of the number of paging messages in the group.

[5] PacTel Waiver Request, p. 2, n.3. PacTel states that it encouraged the major manufacturers to build 2400 bits per second (bps) pagers, which is a doubling of capacity of existing systems.

[6] PageNet Waiver Request, p. 3.

[7] For example, PacTel estimates that the cost to construct its entire nationwide and regional PCP systems on a stand-alone basis will be approximately $13 million. PacTel Waiver Request, p.3. PageNet estimates that it can save or defer expenditures up to $8 million dollars through concurrent use of transmitters for common carrier and non-common carrier services in building regional systems. PageNet Waiver Request, p.4.

[8] *Revision and Update of Part 22 of the Public Mobile Radio Service Rules*, 95 FCC 2d 769, 816-819 (1983) (adopting 47 CFR §22.308); *Amendment of Parts 2 and 22 of the Commission's Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, 3 FCC Rcd 7033 (1988) (adopting 47 CFR §22.930).

[9] Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993).

[10] 47 U.S.C. §332(c)(1) (1993).

[11] *See Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994), *erratum*, 59 Fed. Reg. 18493 (April 19, 1994).

[12] *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 94-100, adopted April 20, 1994.

[13] *See Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services*, 89 FCC 2d 1337 (1982).

[14] *See, e.g., Public Mobile Radio Services*, 82 FCC 2d 152 (1980) (elimination of financial qualifications showing); *Public Mobile Radio Services*, 69 FCC 2d 398 (1978)(elimination of prior state certification requirement); *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, 95 FCC 2d 769 (1983)(reducing application requirements).

joint use only in circumstances where the Part 22 licensee uses a batched paging function as a part of its shared transmission system. We also seek comment on whether there are other circumstances in which we should not permit the shared use of transmitters licensed under Part 22. We solicit comment on appropriate safeguards to prevent warehousing of exclusively assigned frequencies if we modify or eliminate Section 22.119. Finally, we seek comment on whether we should allow two different licensees to share the same transmitter.

IV. WAIVER ORDER

A. Background

8. PageNet, API and Mid-Atlantic seek waivers of Section 22.119 of the Commission's Rules to permit them to share transmitters on any of their existing and future common carrier authorizations with any of their private carrier paging authorizations. PacTel, Metrocall and MobileMedia seek waivers of Section 22.119 of the Commission's Rules to permit them to transmit on PCP frequencies using their existing Part 22 common carrier paging transmitters until either (a) the two services are combined and Section 22.119 is eliminated, or (b) the multifrequency transmitters are loaded to 75% of available airtime.[15] Arch requests a waiver of Section 22.119 to permit it to operate frequency-agile transmitters capable of alternating between transmission of signals to common carrier and private carrier subscribers to permit the inclusion of PCP frequencies capable of providing broad regional and nationwide service on Part 22 transmitters offering local service.[16]

B. Discussion

9. Section 22.19 of the Commission's Rules sets forth the requirements for waiver requests. An applicant must demonstrate that: (a) the underlying purpose of the rule will not be served in the absence of a waiver, and grant of the waiver is in the public interest; or (b) the unique facts and circumstances of a particular case render application of the rule inequitable or contrary to the public interest and there is no reasonable alternative. 47 CFR §22.19. *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

10. PageNet, PacTel, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia have satisfied the requirements of Section 22.19 of the Rules under alternative (a). Each is currently in the process of constructing nationwide or regional PCP systems with coverages extending beyond existing licensed Part 22 systems. The waiver sought by each will permit it to use its existing infrastructure, thereby achieving a significant cost savings which will result in the provision of service sooner and at lower rates to its subscribers. Granting the waivers will also benefit the public by reducing construction costs and carrier resources devoted to paging services, reducing the number of transmitter sites necessary and thereby lowering the costs at which service is made available to the public. Reducing the number of sites also will reduce environmental and public concerns regarding multiple transmitters on sites. Finally, there are no reasonable alternatives to the waiver that could achieve these public interest benefits.

11. Furthermore, the apparent underlying purpose of the rule will not be undermined by granting the instant waivers. There is no reason to believe that petitioners will have inadequate capacity to serve their common carrier customers.

12. PacTel, PageNet, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia have demonstrated that it is in the public interest to allow them to share their common carrier and private carrier paging transmitters in circumstances where such sharing will facilitate the provision of national and/or regional service as an overlay to local services. These waivers will be conditioned on our actions in the rulemaking proceeding, wherein we will consider whether such sharing should be permitted or subject to various safeguards or standards.[17] Accordingly, PageNet,[18] PacTel, Arch, Metrocall, API, Mid-Atlantic, and MobileMedia will be allowed during the pendency of this rulemaking, to operate transmitters authorized under Part 22 for both common carrier and private carrier paging in accordance with their respective waiver requests.

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[15] In support of its waiver request, PacTel states that many of its subscribers are demanding nationwide and regional coverage extending beyond PacTel's current coverage areas. Because PacTel's common carrier frequencies were not available nationwide or over these larger regions, PacTel applied for and was granted nationwide Part 90 PCP authorizations. PacTel has begun constructing its nationwide and regional PCP paging systems. PacTel states that the waiver will allow it to reduce its operating costs by eliminating the need for unnecessary construction of transmitters for its nationwide and regional PCP systems. As noted, PacTel estimates these construction costs at $13 million. PacTel projects that the first several years of operation will result in substantial losses from depreciation and site rent which must be recouped in the service price. If PacTel is permitted to make full use of its existing infrastructure, it will realize significant cost savings, and would be able to pass these savings along to its subscribers by offering lower prices. PacTel Waiver Request at pp. 2-4.

[16] In support of its waiver request, Arch states that it has undertaken to develop a nationwide paging system to satisfy the needs of its customers; however, the lack of a common carrier nationwide paging channel has caused Arch to develop a nationwide private carrier system. Arch presently has applications pending for authority to construct facilities operating on three private carrier frequencies (929.8375, 929.3625, and 929.7875 MHz) at approximately 1,300 sites throughout the nation. Many of these sites are identical to locations where Arch currently owns and operates Part 22 common carrier facilities on 931 MHz. Arch seeks to avoid unnecessary duplication of facilities and states that it will greatly reduce operating costs if allowed to share transmitters between common and private carrier services. Arch Waiver Request at pp. 2-3.

[17] The grants of waivers to PageNet, PacTel and Arch in this order are without prejudice to any future action the Commission may take to restrict the use of common transmitters in multiple services to deter warehousing.

[18] On November 24, 1993, SkyTel Corporation (SkyTel) submitted comments responding to PageNet's waiver request. Although we are not required to do so, we have reviewed SkyTel's comments and find that they lack merit. As we have indicated above, we find that PageNet's requested waiver will serve the public interest. In any event, we emphasize that our grant of PageNet's waiver request is conditioned on the outcome of this rulemaking proceeding. Finally, we point out that in light of our proposal to delete Section 22.119 of the Rules, SkyTel will have an opportunity to file formal comments in this proceeding.

V. CONCLUSIONS

13. We propose to delete Section 22.119 of the Rules to allow transmitters authorized under Part 22 to be concurrently licensed and used for both common carrier and private carrier operations. We believe that this proposed rule change will promote more effective use of carrier resources without undermining the rule's purpose. We request comments on the proposals addressed in this Notice. We also find it in the public interest to waive Section 22.119 to allow PacTel, Arch, PageNet, Metrocall, API, Mid Atlantic, and MobileMedia to operate their authorized Part 22 transmitters as set forth herein.

VI. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j), 303(r), this Notice of Proposed Rule Making IS ISSUED.

15. IT IS FURTHER ORDERED THAT the Secretary shall cause a copy of this Notice to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

16. IT IS FURTHER ORDERED THAT the waiver request filed by Paging Network, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

17. IT IS FURTHER ORDERED THAT the waiver request filed by PacTel Paging IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

18. IT IS FURTHER ORDERED THAT the waiver request filed by Arch Communications Group, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

19. IT IS FURTHER ORDERED THAT the waiver request filed by Metrocall, Inc. IS GRANTED, to the extent described herein, and conditioned on the outcome of the rulemaking proceeding.

20. IT IS FURTHER ORDERED THAT the waiver request filed by American Paging, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

21. IT IS FURTHER ORDERED THAT the waiver request filed by Mid-Atlantic Paging Company, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

22. IT IS FURTHER ORDERED THAT the waiver request filed by MobileMedia Communications, Inc. IS GRANTED, to the extent described herein, and is conditioned on the outcome of the rulemaking proceeding.

23. For further information, contact Dan Abeyta, at (202) 632-6450, Mobile Services Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

William Caton
Acting Secretary

APPENDIX A

PROCEDURAL MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, as long as they are disclosed as provided in the Commission's Rules. *See* generally 47 CFR §§ 1.1202, 1.1203, 1.1206(a).

Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments on or before **July 11, 1994** and reply comments on or before **July 26, 1994**. To file formally in this proceeding you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

Reasons for Action

This rule making proceeding is initiated to obtain comment regarding changes in the provision of common carrier and private carrier paging services through the use of a single transmitter.

Objectives

The purpose of the proposed rule is to promote economic efficiencies for carriers in providing paging services.

Legal Basis

The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j), 303(r).

Reporting, Recordkeeping and Other Compliance Requirements.

None.

Federal Rules Which Overlap, Duplicate or Conflict with These Rules.

None.

Description, Potential Impact, and Number of Small Entities Involved.

A rule change in this proceeding would benefit providers of common carrier and private carrier paging services by reducing costs. A number of these providers are small entities.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives.

We have determined no specific alternatives.

APPENDIX B

PROPOSED RULES

Title 47 of the Code of Federal Regulations, Part 22, is amended as follows:

Part 22 - Public Mobile Service

1. The authority citation for Part 22 continues to read as follows:

Authority: Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303.

2. Section 22.119 is removed and reserved.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

CENTURY SOUTHWEST CABLE
TELEVISION CORP.

Petition for Stay of Local
Rate Order of City of
Beverly Hills, CA

ORDER

Adopted: May 6, 1994; Released: May 9, 1994

By the Acting Chief, Cable Services Bureau:

1. Century Southwest Cable Television Corporation ("Century") filed on April 8, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Beverly Hills, California ("Beverly Hills" or "City") pending the Commission's resolution of Century's underlying appeal[1] of the local rate order.[2] Century's deadline for compliance with the local rate order is May 10, 1994. Beverly Hills filed an Opposition to Emergency Petition for a Stay on April 26, 1994.[3] Century asserts that if a stay of the local rate order is not granted, it will be required to implement refunds to subscribers totaling $75,000 on May 10, 1994 and will be forced to forgo monthly revenues on a prospective basis of $14,500.

2. The main contention raised in Century's petition for stay centers on Beverly Hills' treatment of channels offered by Century in an a la carte package. Century asserts that the City denied Century due process by including these services as regulated channels in determining Century's regulated rates for basic cable service before the Commission had promulgated its rules regarding a la carte offerings.

3. As Century notes in its petition, the a la carte package in question is the subject of a Letter of Inquiry currently pending with the Commission.[4] This Letter of Inquiry specifically required Century to provide detailed information regarding its a la carte channel offerings. The treatment of Century's a la carte offerings as regulated or unregulated channels is vital to Beverly Hills' determination of Century's compliance with rate regulation regarding basic tier service and associated equipment because the number of regulated channels offered is a key variable in determining a system's permitted basic and equipment rates.

4. Because Beverly Hills' local rate order, in deriving Century's benchmark rate, relies upon the treatment of Century's a la carte channels as regulated offerings, it is imperative that any decision rendered by the Commission with regard to the Letter of Inquiry issued to Century does not conflict with Beverly Hills' rate order. This consistency can only be achieved with certainty if the Commission stays Beverly Hills' local rate order pending its own resolution of the proper regulatory treatment of Century's a la carte offerings. Accordingly, we will stay implementation of the local rate order until the outstanding Letter of Inquiry involving Century's a la carte offerings is resolved.

5. If the Commission ultimately concurs with Beverly Hills in treating Century's a la carte channels as regulated offerings, then Beverly Hills may reinstate its original rate order with a new deadline for implementation. However, if the Commission disagrees with Beverly Hills in treating Century's a la carte channels as regulated offerings, then Beverly Hills may be required to issue a new rate order that comports with the Commission's determination.

6. In general, the Commission prefers to leave local regulators determinations undisturbed, provided that those findings are reasonable. *Rate Regulation*, 8 FCC Rcd. 5631 (1993). Until May 15, 1994, however, franchising authorities do not have the authority to rule on the regulatory treatment of cable operator's a la carte offerings. *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket N. 92-266, FCC 94-38 at paras. 191-200 (released March 30, 1994); 47 C.F.R. § 76.986. In this light, and because the clarification of our rate regulations occurred so recently, we are inclined to be more solicitous in the granting of stays in this initial adjustment period so as to minimize subscriber confusion and maximize regulatory consistency.

7. During the period of this stay, Century is ordered, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that Beverly Hills has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that Beverly Hills has set for Century's basic service and equipment in its local rate order. Furthermore, Century is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from Beverly Hills should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.

8. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Beverly Hills, California establishing rates for regulated basic tier service and associated equipment provided by Century Southwest Televi-

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[1] Century filed a Petition for Review concurrently with its stay petition on April 8, 1994.

[2] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[3] Beverly Hills included with its opposition a Request to Submit a Late Filing. Because this order is not granted with regard to the merits raised in either Century's petition for stay or in Beverly Hills opposition, we need not address the issue of Beverly Hills' late filing.

[4] *See Letter of Inquiry, Century Southwest Cable Television, Inc., LOI-93-17 (issued December 13, 1993).*

sion Corporation is STAYED pending resolution by the Commission of issues raised in the Letter of Inquiry issued by the Commission to Century Southwest Cable Television Corporation, LOI-93-17 (issued December 13, 1993). This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

9. IT IS FURTHER ORDERED that this *Order* IS EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 871

MEMORANDUM OPINION AND ORDER

Adopted: June 1, 1994; Released: June 1, 1994

By the Acting Chief, Common Carrier Bureau:

1. On April 18, 1994, the GTE Telephone Operating Companies (GTOCs) filed Transmittal No. 871 to revise its Tariff F.C.C. No. 1. GTOC proposes adding one additional telephone company wire center to the locations where physical expanded interconnection service is available. GTOC states that the purpose of this filing is to respond to a *bona fide* request from a customer for expanded interconnection service in the Sunset wire center located in Santa Monica, California. Description and Justification (D&J) at 1. This transmittal also proposes modifying certain rates for Tampa Main and Tampa #5 wire centers, located in Tampa, Florida. D&J at 2. No petitions were filed against this tariff. .Transmittal 871 is scheduled to take effect on June 2, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 871 is suspended for one day, until June 3, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to GTOC Tariff F.C.C. No. 1, Transmittal No. 871, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that GTOC SHALL FILE tariff revisions within five business days of the effective date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. GTOC should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), GTOC shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1710
Revisions to Tariff F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 1994; Released: June 1, 1994

By the Acting Chief, Common Carrier Bureau:

1. On April 21, 1994, Pacific Bell filed Transmittal No. 1710 to revise its Tariff F.C.C. No. 128. Pacific Bell proposes to revise the installation interval to 300 days for expanded interconnection service in its SNJSCA21 central office, located at San Jose, California. Tariff F.C.C. No. 128, 5th Revised Page 678. No petitions were filed against this tariff. Transmittal 1710 is scheduled to take effect on June 5, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1710 is suspended for one day, until June 6, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1710, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the effective date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

IC Docket No. 94-31

In the Matter of

Preparation for International
Telecommunication Union World
Radiocommunication Conferences

ORDER

Adopted: June 1, 1994; Released: June 2, 1994

By the Chief Engineer:

1. On April 20, 1994, the Commission adopted a *Notice of Inquiry* in the above-captioned proceeding.[1] The specified deadlines for comments and reply comments were June 6, 1994, and June 27, 1994, respectively. By this Order, we are extending the comment and reply comment dates.

2. This proceeding requests comments on a broad range of complex issues, including a review of mobile satellite service allocation and technical matters, a review of the entire international Radio Regulations, a review of space services issues and development of agendas for future World Radio Conferences. Because of the number and complexity of issues being addressed in this proceeding and our desire to receive detailed, substantive responses, we are on our own motion extending the comment and reply comment deadlines.

3. Accordingly, IT IS ORDERED THAT the deadline for filing comments in response to the *Notice of Inquiry* IS EXTENDED to July 15, 1994. IT IS FURTHER ORDERED THAT the deadline for filing reply comments IS EXTENDED to August 5, 1994. This action is taken pursuant to authority found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 303, and pursuant to Sections 0.31, 0.241, and 1.46 of the Commission's Rules, 47 C.F.R. Sections 0.31, 0.241, and 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

[1] *Notice of Inquiry*, IC Docket No. 94-31, 59 Fed Reg 25873 (May 18, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The GTE Telephone Operating Companies — AAD 94-36

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 1994; Released: April 8, 1994

By the Commission:

I. INTRODUCTION

1. In the course of a routine audit on delegated authority of transactions between the GTE Telephone Operating Companies (GTOCs) and two nonregulated GTE affiliates, GTE Supply (GTES) and GTE Data Services, Inc. (GTEDS),[1] Common Carrier Bureau (the Bureau) staff prepared a Summary of Audit Findings (the Summary). The Summary is based on information supplied by the GTOCs, GTES and GTEDS in the course of the audit. Pursuant to Section 220(f) of the Communications Act of 1934, as amended, we hereby direct the Bureau to release the Summary to the public for the reasons stated herein.[2]

2. The Bureau initiated its audit in February, 1991, to determine whether transactions between the GTOCs and the two nonregulated affiliates for the years 1988 through 1990 complied with the Commission's affiliate transaction rules codified in 47 C.F.R. Section 32.27. These rules prescribe federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliates on the carrier's regulated books of account. The results of the staff's audit are set out in the Summary.

II. DISCUSSION

3. This Commission has a longstanding policy of respecting the confidentiality of information and documents obtained from common carriers during audits performed by Commission personnel.[3] Ultimately, this policy emanates from Section (220(f) of the Communications Act and Exemption 4 of the Freedom of Information Act ("FOIA").[4] Section 220(f) of the Communications Act prohibits the public disclosure by Commission personnel of facts and information obtained during an audit absent a Commission or court order. Exemption 4 of the FOIA permits the Commission to withhold from public inspection confidential commercial or financial information. These statutory provisions reflect a congressional recognition that businesses that provide sensitive commercial and financial information to government agencies retain a legitimate interest in preserving the confidentiality of that information.

4. Accordingly, the Commission withholds from public disclosure raw financial data obtained from carriers during audits as well as audit workpapers compiled by Commission staff.[5] Likewise, our general policy is to withhold from public disclosure audit reports prepared by Commission staff.[6] In the vast majority of instances, such reports are based on information provided by carriers subject to claims of confidentiality. Moreover, the Commission considers such audit reports to be internal agency documents that generally should not be disclosed because they present preliminary staff findings and recommendations to assist the Commission in pre-decisional deliberations. We have departed from this general policy and released audit reports prepared by Commission staff only in exceptional cases when we have determined: (1) that the summary nature of the data and information contained in a particular report is not likely to cause the providing carrier substantial competitive injury; (2) that release of summary data and information is not likely to impair our ability to obtain such information in future audits; and (3) that overriding public interest concerns favor release of the report.[7]

5. The underlying concerns that normally lead us to withhold audit information from public disclosure are diminished or outweighed in this case. Disclosure of the information in question in these circumstances is not likely to cause the GTOCs, GTES or GTEDS competitive harm, substantial or otherwise. The Summary contains no de-

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[1] GTES distributes telecommunications and computer products to the GTE telcos, other GTE affiliates and nonaffiliated third parties. Since 1987 GTES also has provided centralized procurement services exclusively to the GTE telcos. GTEDS provides centralized data processing services to the GTE telcos, other GTE affiliates and nonaffiliated third parties. GTEDS's services include on-line and batch processing, systems development, programming, and other, related data processing activities.

[2] 47 U.S.C. Section 220(f). Concurrently with this Order, we are adopting an Order adopting a Consent Decree which settles those issues raised by the staff's affiliate transactions audit of the GTOCs, GTES and GTEDS. Pursuant to the terms of the Consent Decree, the GTOCs agree, *inter alia*, to appropriately reduce their carrier common line rate and make a voluntary contribution to the United States Treasury. *See In the Matter of the GTE Telephone Operating Companies*, FCC 94-15, released April 8, 1994.

[3] *See* Bell Communications Research, Inc., Public Release of Information Obtained During Joint Audit, *Memorandum Opinion and Order*, 7 FCC Rcd 891, 892 (1992) (*"Bell Order"*); National Exchange Carrier Ass'n, Request for Confidential Treatment of Certain Financial Information, *Memorandum Opinion and Order*, 5 FCC Rcd 7184, para. 5 (1990) (*"NECA Order"*); J. David Stoner, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 6458, 6459, para. 12 (1990) (*"Stoner Order"*) ; Martha H. Platt, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 5742, para. 6 (1990) (*"Platt Order"*) ; Scott J. Rafferty, On Request for Inspection of Records, *Memorandum Opinion and Order*, 5 FCC Rcd 4138, para. 5 (1990) (*"Rafferty Order"*); Western Union Telegraph Co., On Request for Inspection of Records, *Memorandum Opinion and Order*, 2 FCC Rcd 4485, 4486, para. 11 (1987).

[4] 5 U.S.C. §552(b)(4).

[5] *See, e.g., Stoner Order*, 5 FCC Rcd 6458; *Platt Order*, 5 FCC Rcd 5742; *Rafferty Order*, 5 FCC Rcd 4138.

[6] *See NECA Order*, 5 FCC Rcd 7184, 7185, n.15 (Commission's general policy is to preserve confidential status of audit reports); *Platt Order*, 5 FCC Rcd 5742, 5743, n.8.

[7] *See Bell Order*, 7 FCC Rcd 891, 892; *NECA Order*, 5 FCC Rcd 7184 (1990); New York Telephone Co., Request for Confidential Treatment of Certain Financial Information, *Memorandum Opinion and Order*, 5 FCC Rcd 874 (1990) (*"NYT Order"*) .

tailed underlying financial information submitted by the GTOCs, GTES and GTEDS; rather, it contains only data and financial information presented in summary form. The data and information contained in the Summary are a result of the analysis and aggregation of the underlying data and information submitted by the GTOCs, GTES and GTEDS. Assuming arguendo that competition exists for the services and products at issue, the summary nature of the information contained in the Summary of Audit Findings diminishes significantly the likelihood that the GTOCs, GTES and GTEDS would suffer substantial competitive injury as a result of disclosure. For instance, while the audit report shows GTEDS's return on investment for the years 1988 through 1990, these figures would not be especially useful to any competitors in pricing their own products or services or devising competitive initiatives to challenge GTEDS because such information is not related to individual products.

6. Moreover, we believe there is a significant public interest to be furthered by disclosure of this Summary. Transactions between regulated telephone companies and their nonregulated affiliates may lead to unreasonable rates and burden consumers when ratepayer safeguards are not observed. Disclosure of the Summary will provide information to ratepayers and other interested parties about the context of the staff's investigation and the resulting settlement.

7. Finally, in this instance we believe the public interest in disclosure warrants a limited exception to our general policy of nondisclosure in order not to impair our ability to obtain such information in the future. In contrast with most audits, we believe that limited disclosure is appropriate here in order to clarify the circumstances surrounding the voluntary remedial actions taken by the GTOCs.[8] We wish to make clear, however, that audit reports concerning common carrier matters are made available for public inspection only in "exceptional" cases.[9] Our general policy is to preserve the confidential status of audit reports, but we have determined here that, given the particular nature of these proceedings and the specific information at issue, disclosure of the Summary is warranted.

8. Pursuant to Section 0.459(g) of the Commission's Rules,[10] the GTOCs, GTES and GTEDS will be afforded five working days in which to seek a judicial stay of this Commission ruling. We direct the Chief, Common Carrier Bureau, immediately upon Commission adoption of this Order, to furnish by telephone to the GTOCs, GTES and GTEDS notice of our determination and of the time for seeking judicial stay, as well as subsequent notice in writing and a copy of the Summary of Audit Findings as set forth below.

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(j), that a copy of this *Order* and the Summary of Audit Findings shall be served upon the GTE Telephone Operating Companies, GTES and GTEDS.

10. IT IS FURTHER ORDERED, pursuant to Section 220(f) of the Communications Act of 1934, as amended, 47 U.S.C. §220(f), and Section 0.459(g) of the Commission's Rules, 47 C.F.R. §0.459(g) (1992), that the Common Carrier Bureau is authorized to release the Summary of Audit Findings for public inspection on the sixth working day following service of the report upon the GTE Telephone Operating Companies, GTES and GTEDS absent issuance of a judicial stay.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

STAFF SUMMARY OF AUDIT FINDINGS

1. The main purpose of the audits of transactions between GTE telcos and the two GTE affiliates -- GTE Supply (GTES) and GTE Data Services (GTEDS) -- was to determine whether these transactions complied with Section 32.27 of the Uniform System of Accounts, Transactions with affiliates, 47 C.F.R. Section 32.27. Specifically, the audits were designed to review the pricing policies and measure the earnings levels of GTES and GTEDS in transactions with GTE telcos, and to quantify the effect of GTES and GTEDS earnings on the telcos' revenue requirements for the period 1988 to 1990. In both cases, the auditors found that the GTE affiliates were improperly earning far in excess of the authorized rate of return (12.0%) for the parent telcos and that, therefore, the affiliates are in violation of Section 32.27 of the Commission's Rules.

I. Audit of Affiliate Transactions Between GTE Telcos and GTE Supply

2. GTES distributes telecommunications and computer products to the GTE telcos, other GTE affiliates and nonaffiliated third parties. Since 1987, GTES has also provided centralized procurement services exclusively to the GTE telcos. These services include, primarily, contract negotiation, purchasing, and material and fleet management. For the three year period 1988-1990 GTES's sales were approximately $1.8 billion, of which about $231 million (13%) were with third (i.e., unaffiliated) parties. The remaining 87% of sales were billed to GTE affiliates, with $1.5 billion (83%) to GTE telcos and $74 million (4%) to GTE nonregulated affiliates. During this same period GTES earned $38.6 million from sales to the telcos and lost $19.8 million on sales to other parties.

3. GTES's earned return on investment (ROI) on transactions with GTE telcos for the period 1988-1990 ranged from 13.7% in 1988 to 24.1% in 1990, well in excess of the

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[8] *See* n.2, *supra*.

[9] *See Bell Order*, 7 FCC Rcd at 892; *NECA Order*, 5 FCC Rcd 7184; 7185, n.15; *Platt Order*, 5 FCC Rcd 5742, 5743, n.8, *citing NYT Order*, 5 FCC Rcd 874 (1990).

[10] 47 C.F.R. §0.459(g). We note that, under terms of the Consent Decree adopted concurrently with this Order, the GTOCs waive any right to contest release of the staff's audit findings. Absent a formal request for waiver of Section 0.459(g), and given the shortness of the delay involved, we will not alter those ordinary procedures otherwise required by our Rules.

12.0% interstate authorized ROI. The excessive ROI during this period resulted in overbillings to the GTE telcos of approximately $24.5 million. Specifically, the auditors found the following earned ROI and overbillings for GTES during the three year period:

Year	Authorized ROI	GTES ROI	Total Overbillings
1988	12.0%	13.7%	$1.6M
1989	12.0%	19.4%	$9.5M
1990	12.0%	24.1%	$13.4M
TOTAL			$24.5M

The GTE telcos recorded the amounts billed by GTES in their regulated accounts without any adjustments for excessive return.

4. Section 32.27 of the Commission's Rules sets out the accounting rules for recording transactions with affiliated companies. These rules provide that services purchased from an affiliate shall be recorded in the regulated accounts at the market rate when the affiliate has a substantial market for the same services to unaffiliated persons or entities. When a carrier does not have a substantial market with nonaffiliated persons or entities for the same services the rules state that the services shall be recorded at the affiliate's cost. This cost includes a ROI equal to the authorized interstate rate of return (ROR) for regulated company operations.

5. The GTOCs aver that GTES has a substantial third party market and charges the telcos what it describes as market prices, i.e., that GTES's $231 million in sales to third parties (13% of total sales) justifies the use of market prices.

6. Whatever the merits of GTOCS's claim regarding substantial third party sales by GTES, the auditors determined that the prices charged to the telcos cannot be compared with the prices charged to third party customers. GTES charged the telcos for the cost of materials purchased from suppliers, plus a mark-up of approximately 5% representing the return component. The telcos also received a separate monthly bill which was designed to recover GTES's overhead costs as well as costs incurred for providing material management and purchasing services.

7. The auditors found that third party customers, on the other hand, were charged a single price for each product and that this single price was designed to cover the cost of the product, overhead, and a profit element. Thus, even though GTES argues that sales to the telcos were priced the same, or lower, than sales to third parties, GTES did not use the same pricing in the two cases. Moreover, the prices charged to the telcos did not reflect large volume discounts; prices to third party customers were usually negotiated on demand and provided for discounts in the ordinary course of business.

8. As a result, the auditors concluded that GTES has not met the criteria required under the Commission's Rules which would allow it to charge the prevailing market price, and, therefore, GTES prices to the telcos should be based on cost as provided in Section 32.27.

9. The GTOCs aver that there was no substantial or material difference in the treatment of GTES sales to the telcos and third party customers.

II. Audit of Affiliate Transactions between GTE Telcos and GTE Data Services

10. GTEDS is a wholly-owned subsidiary of GTE Corporation established to provide centralized data processing services to GTE's operating telcos. It now provides services to other GTE affiliates and to unaffiliated, third parties as well. GTEDS's services include on-line and batch processing, systems development, programming, and other related data processing activities.

11. For the period 1988 through 1990, GTEDS's revenues were $1.3 billion of which $1.1 billion were billed to the regulated affiliates, $80 million were billed to other affiliated and $106 million were billed to unaffiliated entities. GTEDS earned a ROI during this period of between 22.1% and 25.5%. The authorized ROI during this period was 12%. The excessive ROI during this period resulted in overbillings to the GTE telcos of approximately $115.4 million. Specifically, the auditors found the following earned ROI and overbillings for GTEDS during the three year period:

Year	Authorized ROI	GTEDS ROI	Total Overbillings
1988	12.0%	22.1%	$25.8M
1989	12.0%	23.3%	$38.6M
1990	12.0%	25.5%	$51.0M
TOTAL			$115.4M

The GTE telcos recorded the amounts billed by GTEDS in their regulated accounts without any adjustments for excessive return.

12. As with GTES, the GTOCs maintain that there have been no overbillings and that GTEDS rates charged to the GTE telcos lawfully reflect market prices. In other words, the GTOCs argue that because GTEDS has a substantial third party market it may charge the telcos market prices which may lawfully exceed cost-derived prices required by the USOA where a company does not have a substantial third party market.

13. Again, regardless of the merits of the third party market claim, the auditors found that prices charged to the telcos were unlawfully excessive. This is true not because of the amount of sales made to third parties, but because GTEDS did not use prices charged to third parties to set prices for the telcos.

14. The auditors found, instead, that GTEDS used various methods to establish what it considers to be market prices, including utilization forecasts and a ROR on equity of approximately 25% to develop prices. GTEDS also established prices by making comparisons with other suppliers of similar services and through studies of prevailing prices performed by several consulting organizations.

15. Although the GTOCs allege that the prices charged by GTEDS for telco-provided services were equal to, or less than, prices charged to third party customers, the auditors found that valid price comparisons could not be made because of the different methods of pricing and billing services. Since GTEDS's prices for third party sales did not, in fact, form the basis for prices charged to the telcos, the auditors concluded that the latter should have been based on costs as provided in Section 32.27.

16. The GTOCs aver that there were no substantial or material differences in the methods employed by GTEDS to price and bill for services provided to the telcos and to third party customers and that the prices for third party sales did form the basis for prices charged to the telcos.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-48

In the Matter of

Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

ORDER

Adopted: June 2, 1994; Released: June 2, 1994

Comment Date: June 15, 1994
Reply Comment Date: July 15, 1994

By the Chief, Mass Media Bureau

1. This action extends the deadline for filing further comments by interested parties and proposed remarks by panelists in the *En Banc* hearing on Children's Television in the above-cited docket (58 Fed. Reg. 14367) pertaining to rules and policies relating to the levels and types of television programming necessary to adequately serve the educational and informational needs of children. The deadline for further comments and proposed remarks by panelists was originally set for June 8, 1994.

2. The Center for Media Education and the American Psychological Association request a one-week extension of the comment period in order to adequately prepare their presentations for the Commission's hearing.

3. In light of the foregoing, the Bureau finds that good cause exists for an extension. Pursuant to 47 C.F.R. § 0.283, the deadline for filing further comments by interested parties and proposed remarks by panelists in the *En Banc* hearing is extended to June 15, 1994. The deadline for filing reply comments remains July 15, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Applications for Consent To Transfer of Control of Domestic Satellite Earth Stations from	HOME SHOPPING CLUB, INC. File No. 1093-DSE-TC-94(4) Call Sign E872068-X
LIBERTY MEDIA CORPORATION to TCI/LIBERTY HOLDING CORPORATION	SUNSHINE NETWORK File No. 1089-DSE-TC-94 Call Sign E881402

ORDER

Adopted: May 27, 1994; Released: June 9, 1994

By the Chief, Domestic Facilities Division:

1. Liberty Media Corporation (LMC) requested authority to transfer control of the referenced earth stations to TCI/Liberty Holding Corporation. Concurrently, LMC requested similar action on facilities licensed in other services. Public Notice of action was taken with respect to the earth station facilities (File Nos. 1089-DSE-TC-94 and 1093-DSE-TC-94(4)) was given on April 27, 1994. Action on the other requests is still pending. In order to consolidate action on all requests submitted by LMC and to address fully all issues raised in those proceedings, the authorizations granted with respect to the referenced earth station facilities are hereby rescinded pursuant to Section 1.108 of the Commission's rules, 47 C.F.R. § 1.108. The applications for transfer of control of the domestic earth station facilities will be placed on pending status, until such time as action can be taken on all requests.

2. Therefore, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, the authorizations granted to Liberty Media Corporation in File Nos. 1089-DSE-TC-94 and 1093-DSE-TC-94(4) ARE RESCINDED, without prejudice, and these applications are returned to pending status, until action is taken on all LMC applications.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The GTE Telephone Operating Companies — AAD 94-35

Consent Decree Order

Adopted: January 28, 1994; Released: April 8, 1994

By the Commission:

1. In February of 1991, the Common Carrier Bureau ("Bureau") initiated an audit concerning the business transactions that occurred among the GTE Telephone Operating Companies ("GTOCs")[1] and two of their nonregulated affiliates, GTE Supply ("GTES") and GTE Data Services, Inc. ("GTEDS"), between 1988 and 1990.

2. The audit revealed that GTES and GTEDS achieved, through sales of services to the GTOCs, rates of return substantially in excess of the Commission-prescribed authorized rate of return for the interstate access services of the GTOCs in every year examined. The audit further found that the GTOCs apparently recorded the full charges for these services provided by GTES and GTEDS as regulated costs, and that the GTOCs apparently passed these costs on to ratepayers. The GTOCs maintain that rates charged for GTES and GTEDS-provided services were not improper or unlawful.

3. The Commission and the GTOCs have reached an agreement with respect to these audit findings. The terms and conditions of this agreement are contained in the attached Consent Decree.

4. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

5. Accordingly, IT IS ORDERED that the Consent Decree, incorporated by reference herein, and attached to this Order, IS HEREBY ADOPTED and the Secretary shall sign such Consent Decree on behalf of the Commission.

6. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[1] The GTOCs are GTE California, GTE Florida, GTE Hawaiian Telephone, GTE North, GTE Northwest, GTE South and GTE Southwest.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The GTE Telephone Operating Companies — AAD 94-35

CONSENT DECREE

1. This is a Consent Decree between the Federal Communications Commission ("Commission") and the GTE Telephone Operating Companies ("GTOCs").

2. In February, 1991, the Common Carrier Bureau, acting on delegated authority, initiated a routine audit of the GTOCs and their business transactions with their nonregulated affiliates for the years 1988 through 1990. This audit centered on the application of the Commission's affiliate transaction rules, codified in 47 C.F.R. Section 32.27, which prescribe federal accounting requirements for recording transactions between a regulated carrier and its nonregulated affiliate on the carrier's regulated books of account.

3. The auditors found that GTE Supply ("GTES") and GTE Data Services, Inc. ("GTEDS"), nonregulated affiliates of GTE Corporation, achieved, through sales of services to the GTOCs, rates of return which substantially exceeded the Commission-prescribed authorized rate of return for the interstate access services of the GTOCs. The auditors further found that the GTOCs apparently recorded the full charges for those services provided by GTES and GTEDS as regulated costs, and that the GTOCs apparently passed on these costs to ratepayers.

4. The GTOCs aver that both GTES and GTEDS have substantial third party markets and that in such cases the Commission's rules allow affiliates to charge market rates which may lawfully exceed cost-derived prices required where an affiliate does not have substantial third party sales. As a result, the GTOCs maintain that costs of GTES and GTEDS-provided services are reasonably reflected in rates charged to the GTOCs and are, therefore, appropriately recorded by the GTOCs in regulated accounts.

5. The Commission and the GTOCs agree that the expeditious resolution of issues raised by the audit in accordance with the terms of this Consent Decree is in the best interest of the public and GTOC ratepayers.

6. Accordingly, in consideration of the Commission's agreement to terminate its audit on the terms set forth in this Consent Decree, the GTOCs agree to act as specified in paragraphs 6(a) through 6(e) of this Consent Decree:

(a) The GTOCs will file a tariff, with an effective date of April 15, 1994, lowering their carrier common line rate by $49.5 million on an annualized basis, from the rate in effect July 1, 1993. Notwithstanding Sections 61.43 and 61.46(d), (e) and (f) of the Commission's Rules, the GTOCs will not raise their com-

mon line rate prior to an effective date of January 1, 1995, except as the Commission shall permit or require to reflect exogenous changes in the GTOCs' costs.

(b) The GTOCs will make a permanent downward adjustment of $14 million to their price cap index for the common line basket, effective April 15, 1994.

(c) The GTOCs will make a voluntary contribution to the United States Treasury, without further protest or recourse, in the amount of $350,000, within seventy-five (75) days after the Order adopting this Consent Decree becomes a Final Order.[2] This voluntary contribution will be recorded in Account 7370, Special Charges, and will be treated for income tax purposes as if it were subject to Section 162(f) of the Internal Revenue Code.

(d) The GTOCs shall add $49.5 million to their revenue for 1994 in reporting rate of return pursuant to Section 65.500(d) of the Commission's rules and in computing any sharing under the Commission's price cap rules.

(e) The GTOCs waive any right to contest release to the public of the findings of the Commission's audit concerning affiliate transactions between the GTOCs and GTES and GTEDS for the period 1988 through, and including, 1990.

7. In light of the GTOCs' covenants and representations contained in paragraph 6 of this Consent Decree, and in express reliance thereon, the Commission agrees to issue an order formally adopting this Consent Decree (the "Consent Decree Order") and further agrees not to begin on its own motion any proceeding, formal or informal, concerning matters that were the subject of the above-referenced affiliate transactions audit.

8. The GTOCs admit the jurisdiction of the Commission over them and the subject matter of this action for purposes of this Consent Decree and the Order adopting this Consent Decree.

9. The GTOCs waive any rights they may have to judicial review, appeal or rights otherwise to challenge or contest the validity of the Commission Order adopting this Consent Decree, exclusive of the attached "Summary of Audit Findings," and will not engage in conduct inconsistent with the terms of this Consent Decree.

10. Commission approval of this Consent Decree shall terminate its audit of the GTOCs' affiliate transactions for the years 1988 through 1990 without a finding by the Commission of wrongdoing, violations or liability by the GTOCs.

11. It is understoood that the GTOCs' agreement to this Consent Decree does not constitute an admission by them of wrongdoing, violations or of any inconsistency between their position and the Communications Act of 1934, as amended, and Commission rules and policies, or an adjudication of any factual or legal issue. As a result, the GTOCs or their affiliates shall not be precluded or estopped from litigating *de novo* any and all of the issues subject to this Consent Decree in any fora except as provided herein; and that the Consent Decree and Consent Decree Order may not be used in any fashion by any party to this Consent Decree in any legal proceeding except as set forth in this Consent Decree.

12. The GTOCs agree that any violation of the Order adopting this Consent Decree or of the terms of the Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights or remedies attendant to the enforcement of a Commission order.

13. The Commission and the GTOCs agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the audit, issuance of a Consent Decree Order as described herein, and compliance by the GTOCs with the terms of this Consent Decree. If this Consent Decree is not signed by the GTOCs and the Commission, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not become part of the record in this proceeding.

14. If the Commission, or the United States on behalf of the Commission, brings an action in any United States District Court to enforce the terms of the Consent Decree Order or this Consent Decree, the GTOCs agree that they will not contest the validity of either the Order or the Decree, will waive any statutory right to a trial *de novo*, and will consent to a judgment incorporating the terms of this Consent Decree.

FEDERAL COMMUNICATIONS COMMISSION

By: _____

William F. Caton
Acting Secretary

GTE TELEPHONE OPERATING COMPANIES

By: _____

April 5, 1994

[2] Payment may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, at P.O. Box 72482, Chicago, Illinois 60673-7482.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-115

In the Matter of

Revision of Part 22 of the Commission's
Rules Governing the Public Mobile Services

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 20, 1994; Released: May 20, 1994

Comment date: June 20, 1994
Reply comment date: July 5, 1994

By the Commission:

I. INTRODUCTION

1. In this *Further Notice of Proposed Rulemaking* we propose further revisions to Part 22 of our rules governing the Public Mobile Services.[1] These revisions are intended to eliminate unnecessary information collection requirements, streamline licensing procedures, reduce the processing and review burden on the Commission's staff, and ensure that licensees in the public mobile services are fully qualified to provide service to the public as expeditiously as possible.

II. BACKGROUND

2. In the *Notice* adopted in this proceeding in 1992 we proposed comprehensive revisions of Part 22 of the Commission's Rules that would streamline the processing of applications in the Public Mobile Services, remove unnecessary operational requirements and generally facilitate the prompt delivery of new and improved mobile services to the public.[2] Prior to the adoption of a Report and Order in this proceeding, however, Congress enacted the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"). The Budget Act amended: Section 3(n) and Section 332 of the Communications Act (the "Act") to create a comprehensive, regulatory framework for all mobile radio services, including existing Part 22 common carrier mobile services, private land mobile services, and future services, such as Personal Communications Services (PCS).

3. In light of the broad scope of these statutory changes that affect the regulation of mobile services, action on the Part 22 revision proceeding was deferred. We have since adopted a comprehensive Order implementing the basic provisions of Sections 3(n) and 332 of the Act, as amended by the Budget Act.[3] We also have adopted an *Order* prescribing regulations to implement competitive bidding for certain radio licenses.[4] In addition, we are adopting today a companion Further Notice of Proposed Rulemaking that begins the process of conforming technical, operational, and licensing rules applicable to commercial mobile radio service (CMRS) providers that are subject to Part 22 and Part 90 of the Commission's Rules.[5] This process, which was mandated in the Budget Act, is intended to advance the congressional goal of regulatory symmetry with regard to CMRS by rationalizing and equalizing to the extent possible rules that will apply to CMRS providers, including newly reclassified private mobile radio service (PMRS) providers, at the end of the three-year transition period established in the legislation.

4. As we move forward in developing a regulatory framework for CMRS, we have concluded that we should also propose additional revisions to Part 22 as the next phase in the process of rewriting Part 22 that we began nearly two years ago. We believe that the changes we propose today, if subsequently adopted, can be incorporated into the new regulatory framework that emerges from the actions we have already taken and will take in the future in related dockets. In the meantime, we believe that the revisions to Part 22 suggested here and in the earlier Notice will further streamline and improve our existing processing procedures in ways that will benefit existing licensees as well as future users of mobile services.

III. PROPOSALS AFFECTING CELLULAR SERVICE

A. Service Area Boundary Extensions

5. Our current rules allow a cellular licensee to expand its composite Service Area Boundary (SAB) into an adjacent cellular service territory pursuant to a written agreement with the latter licensee. A licensee is permitted to expand its SAB into an adjacent CGSA at any time and may extend into an adjacent MSA or RSA, provided the 5 year fill-in period has not expired.[6] Many of the contracts included with FCC Forms 489 that notify the Commission of such minor modifications simply acknowledge a licensee's permission to allow a SAB extension into its market,

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[1] We adopted a Notice of Proposed Rulemaking in this docket on May 14, 1992, proposing comprehensive revisions to Part 22 of the Commission's Rules. That proposal remains pending, and now is augmented by the proposals we adopt today. Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Notice of Proposed Rulemaking, 7 FCC Rcd 3658 (1992) Notice.

[2] For example, the Commission proposed granting all PLMS and Rural Radio applications on the condition that actual interference does not occur upon commencement of service, and eliminating the requirement that applicants requesting one or more channels for an existing two-way station file traffic loading studies.

[3] Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994).

[4] Implementation of Section 309(j) of the Communications Act, PP Docket No. 93-253, Second Report and Order, FCC 94-61, released April 20, 1994.

[5] Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Further Notice of Proposed Rulemaking, FCC 94- 100, adopted April 20, 1994.

[6] *See* Section 22.903(d).

even when the 5 year fill-in period has expired. In these cases, the staff must devote a significant amount of time to determine if the SAB extension covers any unserved area, because licensees may apply to serve such areas only by filing a separate application with the Commission. Therefore, we are proposing to require licensees notifying the Commission of minor modifications to their systems on FCC Form 489, which include SAB extensions into the adjacent market, to specify whether the 5 year fill-in period for the market has expired and, if so, to state that the SAB extension does not cover any unserved area.

B. Map Scale

6. Section 22.926 of the Commission's Rules[7] provides that maps required to be filed by our rules must be on a scale of 1:250,000. We propose to revise the scale of these maps to 1:500,000. We believe that changing the map scale to 1:500,000 would serve the public interest by reducing both filing burdens on applicants as well as review burdens on the staff. Because maps on a scale of 1:500,000 are readily available from the U.S. Geological Survey, revision of the existing rule would not result in additional burdens to any applicant. Further, the reduced map size will be more manageable for the Commission staff, applicants, and members of the public who work with these maps. The reduction in the map size will also benefit the Commission by saving filing space necessary to maintain the maps. While the reduction of the map scale from 1:250,000 to 1:500,000 will result in the submission of a less detailed map, we believe that the proposed map size will be sufficient for review purposes by the staff and members of the public. Prior to adoption of the *Second Report and Order* in CC Docket No. 90-6[8] the staff visually reviewed maps to ensure that they complied with Commission rules and did not produce overlapping CGSAs. In the *Second Report and Order*, in that docket, the Commission adopted a mathematical formula from which CGSA boundaries are derived. Because the use of this formula simplifies the process of calculating and plotting CGSAs, detailed maps are no longer necessary. The maps, however, are still used by the staff and members of the public to determine whether CGSA contours extend beyond market boundaries and whether there are any unserved areas. We tentatively conclude that applicants should submit maps on a scale of 1:500,000. We seek comment on this tentative conclusion and on the question of whether another scale would be more appropriate. We note, however, that if commenters recommend another map scale, they should also address whether the maps are readily available.

C. Elimination of Licensing for Inner Cell Sites

7. In the *Notice* we proposed to modify our rules to allow cellular licensees to make minor changes to their facilities and to add transmitters within the contours of authorized stations without seeking prior approval or notifying the Commission of such changes.[9] If we adopt this proposal, we plan to eliminate the listing of internal cell sites on our authorizations for existing licensees. We do, however, intend to maintain accurate, current information regarding the cell sites that constitute a system's CGSA boundary – *i.e.*, the external cell sites. Therefore, we propose to require all cellular licensees to submit the following information for each of their external cell sites: (1) the geographic coordinates and cell site location description as required in Item 27 on Schedule B of FCC Form 401; and (2) the operating and technical parameters for the cell site which is currently required in Table MOB 2 and Table MOB 3 of FCC Form 401. This is a one time filing that would assist the staff in updating the Commission's database systems. We seek comment on our proposal to require licensees to submit this information.

8. Our plan to eliminate the listing of internal cell sites in authorizations will reduce the administrative and processing cost of issuing authorizations. Currently, whenever the Commission's staff issues an authorization to an existing licensee, the staff includes all the licensee's cell sites in the authorization. These authorizations are issued whenever a cell site is changed. In the case of a large cellular carrier with over 200 cell sites that may be updated frequently, each change results in an authorization that may exceed 80 pages in length. Under our proposal the staff would no longer maintain records and issue authorizations for internal sites. Thus, the number of pages in the authorizations for these large carriers would be reduced substantially. Further, this plan will assist the Commission staff in automating the processing of Public Mobile Services applications by eliminating unnecessary information and updating requirements.

9. We recognize that adoption of this proposal would impose an immediate filing requirement upon licensees[10] that the Commission's staff may not be able to accommodate at one time. Therefore, we propose that if the proposal is adopted, the Commission's staff would issue a Public Notice announcing the filing dates for receipt of the external cell site information. We propose to require the information in ascending market order, at periodic intervals. We seek comment on additional proposals for submitting such filings.

D. System Information Updates

10. We propose to modify the rule governing the updated information for existing cellular systems that licensees are required to submit to the Commission before the end of the system filing period. Section 22.925 of the Commission's Rules[11] requires licensees to file maps and updated system information 60 days before the end of the five-year fill-in period. This information includes a full-size map on a scale of 1:250,000, a reduced map, and a current frequency utilization chart.[12] These maps and the charts must accurately depict the location of each cell site and the coverage of the system at the end of the five year fill-in period. Based on the Commission staff's experience with the current requirements, we propose to modify the information that licensees must submit pursuant to this rule.

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7 47 C.F.R. §22.926.

8 *See* Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules, CC Docket No. 90-6, Second Report and Order, 7 FCC Rcd 2449 (1992), *recon.*, 8 FCC Rcd 1363 (1993).

9 *See Notice*, 7 FCC Rcd at 3660-61, 3694-95.

10 *See* para. 7, *supra*.

11 47 C.F.R. §22.925.

12 *See*

First, consistent with our proposal above to revise the map scale, we propose to revise the scale of the full-size map to a scale of 1:500,000. Second, we propose to require that all maps submitted pursuant to this rule show only the exterior cell sites and their respective service area boundaries that make up the CGSA. Since the purpose of updating system information is to enable interested persons to identify any unserved areas in each market, information regarding interior cell sites is irrelevant. Third, we propose to require licensees to include an exhibit providing the coordinates for each exterior cell site and the information currently required in the MOB 3 Table of FCC Form 401. Fourth, we propose to eliminate the requirement that licensees submit a frequency utilization plan or chart. In our experience, this information is not used by the public and rapidly becomes outdated. Finally, we propose to require licensees to label information submitted with the number of the relevant market. That is, all System Information Update maps should provide the number of the market.[13] This standard labelling information will ensure that the maps are associated with the correct files.

11. These proposals collectively will allow the Commission's staff to receive updated maps containing only relevant information and technical data for each existing cellular system in one plan. These proposed modifications will help to reduce staff processing time and reduce the need for greater storage area on the Commission's premises. In addition, we believe that the public will also benefit from the improved access to relevant information that these proposed modifications would produce.

IV. PROPOSALS AFFECTING PUBLIC LAND MOBILE SERVICES

A. 931 MHz Applications

12. In General Docket 80-183, the Commission set forth certain rules and procedures for initial licensing of 931 MHz paging systems governed by Part 22 of the Commission's Rules win order to reduce the number of cases involving mutually exclusive applicants, and to expedite the processing of applications.[14] These rules no longer permit efficient processing of applications resulting in some confusion and delay. For these reasons, we propose to amend our Rules in a further effort to minimize mutually exclusive applications.

13. The procedures that the Commission adopted in *Paging Systems-DPLMRS* provided that applicants for 931 MHz paging frequencies would receive frequency assignments chosen by the Commission staff.[15] In addition, we provided that 931 MHz assignments would be based upon a fixed minimum spacing of 70 miles between co-channel 931 MHz stations. These policies were intended to avoid mutual exclusivity and allow expeditious processing of 931 MHz applications. We stated, however, that if mutual exclusivity did arise, the procedures for dealing with mutually exclusive applications in effect at that time will be followed.[16]

14. In accordance with our direction in *Paging Systems-DPLMRS*, the Bureau issued a Public Notice opening the 931 MHz paging band to new applicants in 1984.[17] In addition, in the Public Notice,[18] the Bureau announced that the normal "notice and cut-off" procedures applicable to all public land mobile services applications, set forth in Section 22.31(c) of the rules, would apply to 931 MHz applications.[19] Under these procedures, a public notice listing the filing of a 931 MHz application as acceptable for filing would be released and would start a 60-day period for the filing of mutually exclusive applications.[20] All applications filed within the 60-day period proposing transmitter locations within 70 miles of each other may be mutually exclusive and are, therefore, considered together as a "processing group." As stated by the Notice, "[if] enough frequencies are available, all applicants may receive a grant." Otherwise, if frequencies are not available for all applicants in the processing group, their "applications . . . would be considered mutually exclusive and placed in a lottery."[21] After the lottery, frequencies are assigned based on the ranking order of applicants in the lottery and the locations proposed by the applicants. When there are enough frequencies for all the applications in the processing group, however, no lottery is held and the first-filed application is granted. The public notice date of the next-filed application in the processing group starts a new 60-day cut-off period for a new group. This process continues until there are more applications in a group than there are frequencies available for them.[22] At that point, a lottery is held.

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[13] For example, if the five year fill-in period was expiring in market "X" and market "Y" has received permission to extend into market "X", the carrier in market "Y" would be required to file a SIU for market "X" showing this extension. The map would be labelled as follows: "This is the SIU for market "X" filed by the market "Y" carrier." Maps filed by the carrier in market "X" for its particular contour only would include the following statement: "This is the SIU for market "X" filed by the market "X" carrier.

[14] Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, General Docket No. 80-183, First Report and Order (*Paging Systems - DPLMRS)*, 89 FCC 2d 1337 (1982), *recon.*, 92 FCC 2d 631 (1982).

[15] *See Paging Systems-DPLMRS*, 89 FCC 2d at 1356. The 931 MHz paging band consists of 40 frequencies (931.0125-931.9875) of which three are reserved for nationwide network paging.

[16] *Id.* at 1357.

[17] *See* Public Notice, Mimeo No. 4395 (Com. Car. Bur. May 24, 1984) (May 24, 1984 Public Notice).

[18] The Public Notice was not published in the Federal Register. Thus, to the extent it established new or modified procedures, it was not binding. *See Nelson Broadcasting Corp.*, 6 FCC Rcd 1765 (1991).

[19] Section 22.31(c) states in pertinent part: "[w]henever three or more applications are mutually exclusive, . . . the earliest filed application establishes the date prescribed in paragraph (b)(2) [the 60 day cut-off period] of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application." *See* 47 C.F.R. § 22.31(c).

[20] *See* 47 C.F.R. §22.31(b)(2).

[21] *See* Public Notice.

[22] This "rolling procedure" is described in *O.R. Estman*, 5 FCC Rcd 7423, 7424 (Com. Car. Bur. 1990). Whether the Bureau procedure is consistent with the rules is at issue in pending

15. The Commission staff has processed 931 MHz paging applications in several major market regions using existing procedures. In some of these markets, lotteries have been held. In other markets, applications are awaiting lotteries. These proceedings present issues that we did not foresee in *Paging Systems-DPLMRS* and have made it difficult to process these applications in a consistent, satisfactorily manner.[23] In particular, the current Part 22 rules may not provide sufficient guidance to inform applicants when 931 MHz spectrum that becomes available will be available for assignment to already pending applications. Therefore, we propose to revise the processing rules for applications for paging frequencies in the 931 MHz band and to apply our new rules to both pending and future applications. We propose to include in the category of pending applications to which the new rules would apply applications that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review.

16. We propose that for all 931 MHz paging applications, applicants must specify the frequency for which they seek authorization.[24] The frequency requested must be available at the time the application is filed. We propose that a frequency be deemed available under circumstances described in Part 22 of the rules and in the *Notice*.[25] Applications that are acceptable for filing will then be placed on public notice. Mutually exclusive applications received within 30 days after the public notice will be considered one processing group.[26] Pursuant to the *Second Report and Order* in PP Docket No. 93-253,[27] mutually exclusive applicants for specific frequencies that are accepted for filing after July 26, 1993, will be subject to the competitive bidding process.

17. We also propose that applicants for 931 MHz paging frequencies with applications pending when final rules become effective be given 60 days from the effective date of a final order in this proceeding to amend their applications to specify frequencies for which they seek authorization.[28] Failure to amend a pending application to specify a frequency will result in dismissal of that application.[29] The pending applications, as amended, will be placed on public notice and petitions to deny may be filed within 30 days consistent with Section 309 of the Act. All pending amended applications and newly filed applications that are mutually exclusive and received within 60 days of the effective date of this Order will be considered together as a processing group this one time only.[30] Consistent with our rules governing new 931 MHz paging applications,[31] we propose that the amended applications be subject to the competitive bidding process. We ask for comment, however, on whether we should instead use lotteries for these applications.[32] We believe that this processing scheme will eliminate the backlog in pending 931 MHz applications[33] and ensure that future channel assignments will be made in a fair and consistent manner.[34]

18. We also request comment on one other matter relating to 931 MHz paging applications. Under the Budget Act, we may use competitive bidding procedures only to select among mutually exclusive applications for an initial license.[35] In the Second Report and Order in PP Docket No. 93-253, we stated that as a general rule we will regard mutually exclusive applications to modify existing licenses as not subject to competitive bidding. *See* Second Report and Order at para. 38. However, we also left open the possibility that, in particular services, some modification applications that are mutually exclusive with other applications, should be treated as initial applications and be subject to competitive bidding. *See id.* at para. 40. In the context of 931 MHz paging, we propose to consider the following to be an initial application: (1) an application anywhere on a new frequency and (2) a proposal to locate a new facility more than two kilometers (1.6 miles) from any existing facility operating on the same frequency. A

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cases. *See* Public Mobile Services Lottery, Lottery No. PMS-31 (Public Mobile Services Lottery) 5 FCC Rcd 7430 (Com. Car. Bur. 1990), *app. for review, petition for recon. pending.*"

[23] *See, e.g., Public Mobile Services Lottery*, 5 FCC Rcd 7420 (Com. Car. Bur. 1990), *app. for review pending; O.R. Estman, supra; Valley Communications*, 5 FCC Rcd 5274 (Mob. Serv. Div. 1990)).

[24] This proposal supersedes Section 22.513 (Channel availability) proposed in the *Notice*. *See* 7 FCC Rcd at 3669.

[25] *See* 47 C.F.R. § 22.44 and proposed Sections 22.142 and 22.144 in *Notice*, at 7 FCC Rcd at 3666. Section 22.44 lists the five ways, other than revocation, that a PLMS authorization can be terminated. The proposals for 931 MHz paging service are intended to be consistent with the general Part 22 revisions in the *Notice* and complement those proposals to streamline our licensing procedures and provide licensees greater flexibility in providing service to the public. For example, proposals regarding automatic expiration and termination of authorizations, if adopted, may be used by applicants for 931 MHz frequencies to improve service to the public.

[26] Generally, applications that propose locations within 70 miles of another proposed facility on the same frequency are mutually exclusive.

[27] Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, *supra* note 4. *See* Section 309(i) of the Communications Act.

[28] Pursuant to Section 1.1112(a) of the Commission's Rules, no filing fees are required with these amendments. 47 C.F.R. § 1.1112(a).

[29] Applications that indicated a frequency preference must be amended to request that same frequency or another one.

[30] If one of the newly-filed competing applications is a modification, rather than an initial application, we are seeking comment on whether the competing applications may be subject to competitive bidding. *See* para. 18, *infra*.

[31] Second Report and Order in PP Docket No. 93-253.

[32] Section 6002(e) of the Budget Act, gives the Commission discretion to use the lottery procedure instead of competitive bidding procedures for licenses where applications were accepted for filing by the Commission before July 26, 1993. Similarly, the Budget Act allows post- July 26, 1993 applications and pre-July 26, 1993 applications that are mutually exclusive to be processed by lottery procedures. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(e)(2), 107 Stat. 312 392 (1993).

[33] There are approximately 700 pending applications for 931 MHz licenses.

[34] We believe that the public interest in expeditious licensing and provision of service far outweighs any potential unfairness to pending 931 MHz applicants that our proposed rule change might cause. It is well-established that the filing of an application does not protect the applicant from subsequent rule changes being applied to the processing of that application. *See e.g., Storer Broadcasting v. FCC*, 351 U.S. 192 (1956); *Hispanic Information and Telecommunications Network, Inc. v. FCC*, 865 F. 2d 1289 (1989).

[35] Communications Act of 1934, 309(j)(1).

931 MHz paging application would be considered a modification of an existing system only if: (1) it proposes new locations two kilometers (1.6 miles) or less from a previously authorized and fully operational base station licensed to the same licensee operating won the same frequency; or (2) the application is for a change of location within two kilometers (1.6 miles) of an existing station licensed to the same licensee on the same frequency; or (3) the application proposes a technical change that would not increase the service contour. While our proposals seek to reduce the possibility of conflicting initial and modification applications, we realize that implementation of this proposal may not avoid mutual exclusivity between an initial application and a modification application in all cases. We invite comment on whether such proceedings may, consistent with the Budget Act, be resolved through competitive bidding and, if legally permissible, whether that approach would be advisable as a policy matter. We also tentatively conclude that we will use first come, first served procedures to process 931 MHz paging modifications licenses in cases in which we conclude, as a result of our examination of the issue in this rule making proceeding, that the use of competitive bidding procedures would not be legally permissible or otherwise appropriate. Under the first come, first served procedure, mutually exclusive modification applications received on the same day would, consistent with the Budget Act, be designated for comparative hearing to determine which modification application should be granted. Major modification filings would still be listed in periodic public notices, and a 30 day period for filing petitions to deny would remain.

19. We seek comment on how these proposals regarding 931 MHz processing will affect applicants for and licensees in the 931 MHz paging frequency band. We also invite commenters to submit alternative proposals.

V. ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

20. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR 1.1202, 1.1203 and 1.1206(a).

Comment Information

21. Pursuant to applicable procedures set forth in Section 1.425 and 1.419, interested parties may file comments on or before June 20, 1994 and reply comments on or before July 5, 1994. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

22. **Reason for action and objective.** The Commission is proposing to revise Title 47, Part 22 of the Code of Federal Regulations to eliminate unnecessary information collection requirements, streamline licensing procedures, reduce the processing and review burden on the Commission's staff, and ensure that licensees in the public mobile services are fully qualified to provide service to the public as expeditiously as possible. The objective of this proposal is to provide effective and adaptive regulation for communications.

23. **Legal Basis.** Authority for this further notice is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, 47 U.S.C. 154(i) and 303(r).

24. **Reporting, Recordkeeping and Other Compliance Requirements.** The proposed rules would retain most of the existing reporting, recordkeeping and other compliance requirements, without significant change. A few new requirements are proposed. For example, one of the proposed rules would require that licensees make an additional statement on FCC Form 489. Another proposal would require applicants and licensees to file maps on a scale of 1:500,000. Overall, these rule modifications and revisions would result in a net reduction in reporting, recordkeeping and other compliance requirements.

25. **Federal rules that overlap, duplicate or conflict with these rules.** None.

26. **Description, potential impact and number of small entities affected.** There are approximately 8,600 licensees subject to the rules in Part 22. A substantial portion of these are small entities. There are also a number of small entities whose business is consulting or providing other services in connection with Part 22. The proposed rewrite would not significantly affect these small entities.

27. **Significant alternatives minimizing impact on small entities and consistent with stated objectives. Notice are meant to simplify and ease the regulatory burden on all Cellular applicants and licensees consistent with the Commission's established public interest objectives.**

28. **Service.** The Chief Counsel for Advocacy of the Small Business Administration will be served with a copy of this Further Notice of Proposed Rulemaking in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a).

VI. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED That, pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(r), this Further Notice of Proposed Rulemaking IS ISSUED. IT IS FURTHER ORDERED That the Secretary shall cause a copy of this Further Notice to be sent to the Chief Counsel for advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton,
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-7

In the Matter of

Amendment of Section 73.606(b), RM-8425
Table of Allotments,
TV Broadcast Stations.
(Eagle River, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 25, 1994; Released: June 10, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 675 (1994), issued in response to a petition filed by Lyle Robert Evans d/b/a Eagle River Television Company ("petitioner"), proposing the allotment of UHF Television Channel 34 to Eagle River, Wisconsin, as that community's first local television service. Petitioner filed comments reiterating his intention to apply for the channel if allotted. No other comments were received.

2. Eagle River (population 1,374)[1] in Vilas County (population 17,707), is located in northeastern Wisconsin, approximately 180 kilometers (110 miles) northwest of Green Bay, Wisconsin.

3. We believe the public interest would be served by allotting Channel 34 to Eagle River, Wisconsin, since it would provide the community with its first local television transmission service. As indicated in the *Notice*, UHF Television Channel 34 can be allotted to Eagle River, Wisconsin, consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules without a site restriction.[2] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the allotment at Eagle River is not affected thereby.[3] Since Eagle River is located within 400 kilometers (250 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective July 25, 1994, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Eagle River, Wisconsin	34

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Population figures are taken from the 1990 U.S. Census.
[2] The coordinates for Channel 34 at Eagle River are 45-55-00 and 89-14-42.
[3] *See Notice of Inquiry*, 2 FCC Rcd 2125 (1987) and *Order*, 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-136

In the Matter of

Amendment of Part 97 of the	RM-7894
Commission's Rules to Relax	RM-7895
Restrictions on the Scope of	RM-7896
Permissible Communications in	
the Amateur Service.	

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1994; Released: June 10, 1994

By the Commission:

1. In the *Report and Order*[1] in this proceeding the Commission amended the amateur service rules concerning permissible communications. David B. Popkin and Rolland D. Cummings filed petitions for partial reconsideration. Both petitions request further relaxation of Section 97.113 of the Rules, 47 C.F.R. § 97.113[2] to permit the retransmission of time broadcasts originated by United States Government stations. Popkin also proposes to amend Section 97.113 to permit the retransmission of other information originated by Government stations. Additionally, he proposes to substitute the phrase "instructional activity" for the phrase "classroom instruction" in Section 97.113(c).[3] Both petitioners state that they presented these views in the comment stage of this proceeding.

2. The rule amendments adopted by the *Report and Order* allow amateur stations greater flexibility to provide communications for public service projects and personal communications needs. Specifically, Section 97.113 was amended to allow licensees to use amateur service frequencies to facilitate events such as races and parades, to support educational activities, to provide personal communications such as making appointments and ordering food, to collect data for the National Weather Service, and to provide assistance voluntarily even where there are other authorized radio services available.[4]

3. The petitioners contend that the Commission failed to address the issues they presented in their comments. As stated in the *Report and Order*, over eighty comments and reply comments were filed to the *Notice*.[5] Although we are not required to discuss the suggestions of each individual commenter in an informal rule making proceeding, we did carefully consider the points raised by the petitioners.[6]

4. Both petitioners contend in the original item, and in this instant Petition for Reconsideration, that the retransmission of time broadcasts should be permitted under the relaxed restrictions. Although the retransmission of government weather broadcasts is authorized in the *Report and Order*, the amateur service community did not want to expand this provision to include the retransmission of other Government broadcasts on amateur service bands. Such transmissions can be widely received using very affordable receivers.

5. Petitioner Popkins' assertion that the term "classroom" is overly restrictive is without merit. The term "classroom instruction" as contained in the rules does not restrict teachers to the physical confines of a "normal" classroom. For the purpose of this rule, what constitutes classroom instruction is left for the teacher to decide, and therefore, the requested rule change is unnecessary.

6. In view of the foregoing, and pursuant to the authority contained in 47 U.S.C. § 154(i), IT IS ORDERED that the petitions of David B. Popkin and Rolland D. Cummings requesting further amendment to the permissible communications rules ARE DENIED.

7. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

8. For further information concerning this *Memorandum Opinion and Order* contact J. Joy Alford, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[1] 8 FCC Rcd 5072 (1993).

[2] Section 97.113(e) provides, in pertinent part: "No station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, except propagation and weather forecast information intended for use by the general public and originated from United States Government stations, and communications, including incidental music, originating on United States Government frequencies between a space shuttle and its associated Earth stations. ..."

[3] Section 97.113(c) provides: "A control operator may accept compensation as an incident of a teaching position during periods of time when an amateur station is used by that teacher as a part of classroom instruction at an educational institution."

[4] *Report and Order* at paragraph 7.

[5] *Report and Order* at paragraph 2.

[6] In *Automotive Parts and Accessories Association, Inc. v. Boyd*, 407 F.2d 330, 338 (D.C. Cir 1968) the court said: "We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making."

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 2, 1994

Ten Local Exchange Carriers File Petitions for Waiver of the Commission's Transport Rules (CC Docket No. 91-213)

Pleading Cycle Established

COMMENTS DUE: June 22, 1994
REPLIES DUE: July 11, 1994

On May 16, 1994, nine local exchange carriers (LECs) filed a joint petition for clarification or waiver of the Commission's transport rate structure rules. These LECs are Southwestern Bell Telephone Company (Southwestern Bell); Ameritech Operating Companies (Ameritech); Bell Atlantic Telephone Companies (Bell Atlantic); Cincinnati Bell Telephone Company (Cincinnati Bell); Lincoln Telephone and Telegraph Company (Lincoln); Lufkin-Conroe Telephone Exchange, Inc. (Lufkin-Conroe); NYNEX Telephone Companies (NYNEX); Pacific Bell and Nevada Bell (Pacific); and Southern New England Telephone Company (SNET). Specifically, the joint petitioners request clarification that the transport rate structure rules do not permit interexchange carriers (IXCs) to order both the direct and tandem rating options for tandem-switched transport. In the alternative, the petitioners seek a waiver to permit IXCs to order either the tandem or direct rating, but not both.

Also on May 16, 1994, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for waiver of the transport rate structure rules to the extent necessary to permit it to provide the direct and tandem rating options on an access tandem-by-access tandem basis rather than an end office by end office basis.

Interested parties filing comments or oppositions to any of these petitions are invited to do so no later than **June 22, 1994**. Parties filing replies may do so no later than **July 11, 1994,**. An original and five copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037. Also, one copy shall be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Copies of these petitions and other related documents may be obtained from International Transcription Service. The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Steven Spaeth, Tariff Division, Common Carrier Bureau at (202) 632-6917.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-49

In the Matter of

Amendment of Section 73.202(b), RM-8446
Table of Allotments,
FM Broadcast Stations.
(Commerce, Oklahoma and
Neosho, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 25, 1994; Released: June 10, 1994

Comment Date: August 1, 1994
Reply Comment Date: August 16, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KBTN, Inc. ("petitioner"), requesting the allotment of Channel 259A to Neosho, Missouri, and substitution of Channel 282A for vacant Channel 259A at Commerce, Oklahoma. Petitioner submitted information in support of the proposal and expressed an intention to apply for Channel 259A at Neosho, if allotted.

2. We believe petitioner's proposal warrants consideration because the proposed allotment at Neosho would provide the community with its first local FM broadcast service. Channel 259A can be allotted to Neosho, Missouri, in compliance with the Commission's spacing requirements provided there is a site restriction 10 kilometers (6.2 miles) south of the community.[1] The site restriction will prevent a short spacing to Station KHST, Channel 260A, Lamar, Missouri. To accommodate channel 259A at Neosho, petitioner requested the substitution of Channel 282A for vacant Channel 259A at Commerce, Oklahoma.[2] Channel 282A can be allotted to Commerce, Oklahoma, in compliance with the Commission's Rules provided there is a site restriction 9.4 kilometers (5.9 miles) northeast of the community.[3] The site restriction will prevent a short spacing to Station KMYZ-FM, Channel 283C1, Pryor, Oklahoma.

3. We shall also seek comments as to whether we should delete Channel 259A at Commerce, Oklahoma, to accommodate the upgrade at Neosho. Channel 259A was allotted to Commerce in MM Docket 84-231. *See* 100 FCC 2d 1332 (1985). A filing window was opened on January 11, 1988, and closed on February 17, 1988. The channel is currently vacant with no applications on file. If an expression of interest is filed during the comment cycle in this proceeding, we would allot Channel 282A to Commerce and open a filing window for the new channel. It is Commission policy not to delete a channel in which interest has been expressed. However, if no interest is expressed for a channel at Commerce, we shall delete Channel 259A and no substitute allotment will be made to the community.

4. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules with respect to the following communities:

OPTION I

	Channel No.	
City	Present	Proposed
Commerce, Oklahoma	259A	282A
Neosho, Missouri	---	259A

OPTION II

Commerce, Oklahoma	259A	---
Neosho, Missouri	---	259A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **August 1, 1994**, and reply comments on or before **August 16, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John M. Pelkey
Haley, Bader & Potts
4350 North Fairfax Drive, Suite 900
Arlington, Virginia 22203-2345

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] The coordinates for Channel 259A at Neosho are 36-46-56 and 94-23-17.

[2] The construction permit held by Commerce Communications, Inc., for Channel 259A at Commerce expired on August 14, 1990, and was cancelled on June 12, 1992.

[3] The coordinates for Channel 282A at Commerce are 37-00-24 and 94-48-54.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-309

In the Matter of

Amendment of Section 73.202(b),	RM-8393
Table of Allotments,	
FM Broadcast Stations.	
(Buhl, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 25, 1994; Released: June 10, 1994

By the Acting Chief, Allocations Branch:

1. Pursuant to the request of Minnesota Public Radio ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 78 (1994), proposing the allotment of Channel 223C2 to Buhl, Minnesota, and reservation of the channel for noncommercial educational use. Supporting comments were filed by the petitioner reiterating its intention to apply for the channel. No other comments were filed.

2. As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (channels 201-220). Exceptions have been made in cases where the channels in the noncommercial educational band are not available because of foreign allocations (Canadian or Mexican) or potential interference to operations on VHF Television Channel 6. In this case, Channels 209 and 211 potentially could be allotted to Buhl consistent with Section 72.207 of the Rules. However, operation from either of these channels would cause objectionable interference to Station WSUP-TV, Channel 6, Superior, Wisconsin.

3. After a review of the comments, we conclude that the reservation of a commercial channel is justified. No party has expressed an interest in the use of the channel as a commercial facility. Channel 223C2 can be allotted to Buhl, Minnesota, in compliance with the Commission's minimum distance separation requirements.[1] Since Buhl is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

4. We believe the public interest would be served by the allotment of Channel *223C2 to Buhl, Minnesota, since it would provide the community with its first noncommercial educational FM channel. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Buhl, Minnesota	*223C2

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel *223C2 at Buhl are 47-29-37 and 92-46-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. 15-DSS-MP/ML-94

Application for Modification of Construction Permit and License for the Telstar 402 Satellite

ORDER AND AUTHORIZATION

Adopted: May 27, 1994; Released: June 10, 1994

By the Chief, Domestic Facilities Division:

1. American Telephone and Telegraph Company (AT&T) has applied to modify the milestone dates for its Telstar 402 domestic fixed-satellite.[1] No comments were filed on this application. For the reasons discussed below, AT&T's application is granted.

2. AT&T was authorized to construct, launch and operate its Telstar 402 satellite in November 1988.[2] The authorization was modified in March 1990 and September 1990.[3] This satellite is a hybrid satellite that will operate in both the 4/6 GHz (C-band) and the 12/14 GHz (Ku-band) frequency bands. The C-band portion of this satellite is intended to replace AT&T's C-band Telstar 302 satellite, which is reaching its end-of-service life. Telstar 402 is assigned to 89^0 W.L. AT&T's current milestone schedule for this satellite is:

	Construction Completion	Launch
TELSTAR 402	February 1994	May 1994

3. AT&T seeks a three-month extension of time in which to complete construction and launch of its TELSTAR 402 satellite. AT&T asserts that this extension is necessary because unanticipated technical problems resulting in failures of similar satellites by the same manufacturer. In identifying and correcting these problems, the construction schedule was delayed. In turn, a new contract was negotiated with the launch provider to allow for the delayed construction. Therefore, AT&T requests brief extensions of the authorized milestone dates.

4. Generally, extensions of implementation milestone dates are granted when the delay in implementation is due to circumstances beyond the control of the licensee. The circumstances presented by AT&T are consistent with this policy. AT&T has already commenced construction of the Telstar 402 satellite, construction is continuing, and the requested extensions are brief. Grant of this extension would serve the public interest.

5. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Application File No. 15-DSS-MP/ML-94 IS GRANTED and the milestone schedule as specified in American Telephone and Telegraph Company, 5 FCC Rcd 5590 (1990) IS MODIFIED as follows:

	Construction Completion	Launch
TELSTAR 402	May 1994	August 1994

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[1] *See* Public Notice, Report No.

[2] American Telephone and Telegraph Company, 3 FCC Rcd 6980 (1988).

[3] American Telephone and Telegraph Company, 5 FCC Rcd 1184 (1990) and American Telephone and Telegraph Company, 5 FCC Rcd 5590 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-5

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Olivia and Sauk Rapids, Minnesota) — RM-8420

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 1, 1994; Released: June 10, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 9 FCC Rcd 691 (1994), proposing the substitution of Channel 269C2 for Channel 269A at Sauk Rapids, Minnesota. The *Notice* was issued in response to a petition filed by Tri-County Broadcasting, Inc. ("petitioner"). Petitioner also requested modification of its license for Station WHMH(FM) to specify operation on the higher class channel. Petitioner filed comments restating its interest in the allotment of Channel 269C2. Olivia Broadcasting Company filed comments in response to the *Order to Show Cause*.

2. As stated in the *Notice*, Channel 269C2 can be allotted to Sauk Rapids in compliance with the Commission's spacing requirements provided Channel 269A at Olivia, Minnesota, is deleted. Olivia Broadcasting Company ("Olivia Broadcasting") is the licensee of Station KOLV, Channel 269A, Olivia, Minnesota. Petitioner proposed the substitution of Channel 261A for Channel 269A at Olivia, which can be used at the current site of Station KOLV.

3. Olivia Broadcasting states that it has no objection to the proposed frequency change at Olivia provided the petitioner reimburse Olivia Broadcasting Company for its expenses incurred in changing their frequency to the new channel.

4. After careful consideration of the proposal, we conclude that the public interest would be served by the channel substitution at Sauk Rapids, Minnesota, as a wide coverage area service will be provided to the community. In order to accomplish the substitution at Sauk Rapids, Channel 261A must be substituted for Channel 269A at Olivia, Minnesota. Both substitutions can be made in compliance with the Commission's minimum distance spacing requirements.[1] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license for Station WHMH(FM), Sauk Rapids, Minnesota, to specify operation on Channel 269C2. We shall also modify the license for Station KOLV, Olivia, Minnesota, to specify operation on Channel 261A in lieu of Channel 269A in accordance with the Commission's Rules.

5. Commission policy requires that Station KOLV be reimbursed for the reasonable cost of changing frequencies from one class A channel to another. Petitioner has acknowledged its responsibility to reimburse Station KOLV, Olivia, for the reasonable costs in changing frequency.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 25, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Olivia, Minnesota	261A
Sauk Rapids, Minnesota	269C2

7. IT IS FURTHER ORDERED, That the Secretary of the Commission, Shall Send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Gregg S. Skall
Ellen S. Mandell
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N. W., Suite 200
Washington, D.C. 20006

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WHMH(FM), Sauk Rapids, Minnesota, IS MODIFIED to specify operation on Channel 269C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

[1] The coordinates for Channel 269C2 at Sauk Rapids are 45-32-00 and 94-17-00. The coordinates for Channel 261A at Olivia are 44-45-51 and 94-55-45.

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the License of Station KOLV, Olivia, Minnesota, IS MODIFIED, to specify operation on Channel 261A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-931005KC except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-931005KC, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Tri-County Broadcasting, Inc., licensee of Station WHMH(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 13, 1994

Released: May 13, 1994

Francine J. Berry
Marilyn J. Wasser
American Telephone and Telegraph Company
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Marc E. Raven
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One First National Plaza
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R. Michael Senkowski
Katherine M. Holden
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Re: AT&T/McCaw Merger Applications
File No. ENF 93-44

Counselors:

This concerns the pending applications seeking the Commission's approval of the transfer of control of various radio licenses in connection with the proposed merger of American Telephone and Telegraph Company (AT&T) and McCaw Cellular Communications, Inc. (McCaw) (referred to jointly as "applicants").

As part of its public interest analysis pursuant to Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), the Commission considers the competitive consequences of the proposed merger.[1] To this end, the staff has reviewed the applicants' filings in this matter and has determined that additional information is necessary to complete the analysis of the competitive effects of the proposed merger with respect to the following product and geographic markets and submarkets in which AT&T or McCaw have not been found to lack market power: domestic interexchange "Basket 1" services;[2] local cellular services; cellular-originated interexchange services;[3] and manufacture and sale of cellular infrastructure equipment and software. Specifically, the staff is interested in examining the documents and information filed with the Department of Justice (the Department) and the Federal Trade Commission (FTC) pursuant to the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act, including any filings responding to a "second request," interrogatories, or any requests for further information from either of those agencies. However, we anticipate that such materials would be voluminous, and there is no appropriate space available for storage and inspection of these materials at the Commission's premises.[4] In these circumstances and because we do not expect that it will be necessary for the bulk of such information to be filed for the record, please make appropriate arrangements so that Commission staff may promptly examine such information at a mutually convenient off-FCC premises location.

We also will require applicants to afford counsel for any party of record in this proceeding a reasonable opportunity to view such materials once an appropriate protective agreement has been entered in accordance with the terms and conditions set forth in the Protective Order issued by the staff on this date.[5] Any such review must be completed by May 30, 1994, with further comments on the application, due June 10, 1994. Applicants may file responsive comments not later than June 20, 1994.

If you have any questions regarding any of the foregoing, please call Adrien Auger, Senior Attorney with the Bureau's Enforcement Division, at (202)632-4887. Participants in this restricted adjudicative proceeding should be mindful of the *ex parte* requirements set forth in Sections 1.1208 - 1.1214 of the Commission's Rules, 47 C.F.R. §§ 1.1208-1.1214.

Sincerely,

/s/
Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

Attachments

cc: parties of record (see appended service certificate)
Department of Justice
Federal Trade Commission

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[1] *United States v. FCC*, 652 F. 2d 72, 88 (D.C. Cir.1980).

[2] *See Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 3052-65 (1989). *See also* the Commission's price cap rules, particularly 47 C.F.R. § 61.42.

[3] *See Implementation of Sections 3(n) and 332 of the Communications Act*, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1467-72 (1994).

[4] *See, e.g., GTE Corporation and Southern Pacific Company*, Memorandum Opinion and Order (FCC 83-72, released Feb. 18, 1983) File No. ENF-83-1 (copy enclosed for ready reference).

[5] *Protective Order*, adopted May 13, 1994, by the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau (copy enclosed).

CERTIFICATE OF SERVICE

I, Sandra Gray, hereby certify that on this the 16th day of May, 1994, original or duplicate copies of the foregoing letter have been sent, by U.S. Mail, U.S. Government frank, to the following:

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John M. Sipple, Jr.
Assistant Director
Pre-Merger Notification Office
Bureau Of Competition
Federal Trade Commission
6th and Pennsylvania
Avenue, N.W.
Room 303
Washington, D.C. 20580

/s/_____
Sandra Gray May 13, 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY and CRAIG O. MCCAW	)	
	)	File No. ENF-93-44
APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL OF RADIO LICENSES	)	

PROTECTIVE ORDER

Adopted: May 13, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On May 13, 1994, the Bureau directed the applicants in the above-captioned proceeding, American Telephone and Telegraph Company and Craig O. McCaw, to make available for review and inspection by the staff and counsel for the parties, documents and information filed by the applicants with the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") pursuant to the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act.[1] These materials may represent or contain confidential or proprietary information. To insure that documents and materials considered by the applicants to be confidential and proprietary are afforded protection, the Bureau hereby enters this Protective Order:

2. Non-disclosure of Stamped Confidential Documents. Except with the prior written consent of the applicants or other person originally designating a document to be stamped as a confidential document, or as hereinafter provided under this order, no stamped confidential document may be disclosed to any person.

> A "stamped confidential document" means any document which bears the legend (or which shall otherwise have had the legend recorded upon it in a way that brings its attention to a reasonable examiner) "CONFIDENTIAL-SUBJECT TO PROTECTIVE ORDER IN File No. ENF-93-44, before the Federal Communications Commission" to signify that it contains information believed to be subject to protection under the Commission's rules. For purposes of this order, the term "document" means all written, recorded, or graphic material, whether produced or created by a party or another person, whether produced pursuant to the Commission's rules, subpoena, by agreement, or otherwise. Documents that quote, summarize, or contain materials entitled to protection may be accorded status as a stamped confidential document, but, to the extent feasible, shall be prepared in such a manner that the confidential information is bound separately from that not entitled to protection.

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[1] Letter from Gregory A. Weiss to Francine J. Berry (May 13, 1994).

3. Permissible Disclosure. Notwithstanding paragraph 2, stamped confidential documents may be disclosed to counsel of record for the parties in this proceeding, including in-house counsel who are actively engaged in the conduct of this proceeding; to the partners, associates, secretaries, paralegal assistants, and employees of such an attorney to the extent reasonably necessary to render professional services in this proceeding; to persons with prior knowledge of the documents or the confidential information contained therein, and their agents; and to Commission officials involved in this proceeding.[2] Subject to the provisions of subparagraph (c) below, such documents may also be disclosed:

(a) to any person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper; and

(b) in the event the Commission orders that depositions may be taken, to persons noticed for depositions or designated as trial witnesses to the extent reasonably necessary in preparing to testify to outside consultants or experts retained for the purpose of assisting counsel in the proceeding; to employees of parties involved solely in one or more aspects or organizing, filing, coding, converting, storing, or retrieving data or designing programs for handling data connected with this proceeding, including the performance of such duties in relation to a computerized litigation support system; and to employees of third-party contractors performing one or more of these functions; provided, however, that in all such cases the individual to whom disclosure is to be made has signed a form containing: (1) a recital that the signatory has read and understands this order; and (2) a recital that the signatory understands that unauthorized disclosures of the stamped confidential documents is prohibited.

(c) Before disclosing a stamped confidential document to any person listed in subparagraph (a) or (b) who is a competitor (or an employee of a competitor) of the party that so designated the document, the party wishing to make such disclosure shall give at least ten days' advance notice in writing to the counsel who designated such information as confidential, stating the names and addresses of the person(s) to who the disclosure will be made, identifying with particularity the documents to be disclosed, and stating the purposes of such disclosure. If, within the ten-day period, a motion is filed objecting to the proposed disclosure, disclosure is not permissible until the Commission has denied such motion.

4. Declassification. A party (or aggrieved entity permitted by the Commission to intervene for such purpose) may apply to the Commission for a ruling that a document (or category of documents) stamped as confidential is not entitled to such status and protection. Applicants or other person that designated the document as confidential shall be given notice of the application and an opportunity to respond. To maintain confidential status, the proponent of confidentiality must show by a preponderance of the evidence that there is good cause for the document to have such protection.

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2 Disclosure may not be made to counsel involved in any related proceeding between the parties pending before the Commission or in courts, except upon specific Commission approval.

5. Confidential Information in Depositions. In the event the Commission orders that depositions may be taken in this proceeding:

(a) A deponent may during the deposition be shown, and examined about, stamped confidential documents if the deponent already knows the confidential information contained therein or if the provisions of paragraph 3(c) above are complied with. Deponents shall not retain or copy portions of the transcripts of their depositions that contain confidential information not provided by them or the entities they represent unless they sign the form prescribed in paragraph 3(b) above. A deponent who is not a party or a representative of a party shall be furnished a copy of this order before being examined about, or asked to produce, potentially confidential documents.

(b) Parties (and deponents) may, within fifteen (15) days after receiving a deposition transcript, designate pages of the transcript (and exhibits thereto) as confidential. Confidential information within the deposition transcript may be designated by underlining the portions of the pages that are confidential and marking such pages with the following legend: "Confidential-subject to protection pursuant to Commission Order." Until expiration of the 15-day period, the entire deposition will be treated as subject to protection against disclosure under this order. If no party or deponent timely designates confidential information in a deposition, then none of the transcript or its exhibits will be treated as confidential; if a timely designation is made, the confidential portions and exhibits shall be filed under seal separate from the portions and exhibits not so marked.

6. Confidential Information Filed in the Record. Subject to the Federal Rules of Evidence, stamped confidential documents and other confidential information may be offered in the record made by the parties and submitted to the Commission in this proceeding, provided that such confidential information is furnished under seal. The Commission will then determine whether the proffered evidence should continue to be treated as confidential information.

7. Filing. If confidential documents are submitted to the Commission in accordance with paragraph 6, the materials shall be filed under seal and shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.

8. Subpoena by Courts or Other Agencies. If a court or another administrative agency subpoenas or orders production of stamped confidential documents which a party has obtained under terms of this order, such party shall promptly notify the party or other person who designated the document as confidential of the pendency of such subpoena or order.

9. Client Consultation. Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of stamped confidential documents; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make specific disclosure of any item so designated except pursuant to the procedures of paragraph 3(b) and (c) above.

10. Prohibited Copying. If a document contains information so sensitive that it should not be copied by anyone, it shall bear the additional legend "Copying Prohibited." Application for relief from this restriction against copying may be made to the Commission, with notice to counsel so designating the document.

11. Use. Persons obtaining access to stamped confidential documents under this order shall use the information only for preparation and the conduct of this proceeding and any subsequent judicial proceeding, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

12. Non-Termination. The provisions of this order shall not terminate at the conclusion of this proceeding. Within 120 days after final conclusion of all aspects of this proceeding, stamped confidential documents and all copies of same (other than exhibits of record, if any) shall be returned to the party or person which produced such documents, or, at the option of the producer (if it retains at least one copy of the same), destroyed. All counsel of record shall make certification of compliance herewith and shall deliver the same to counsel for the party who produced the documents not more than 150 days after final termination of this proceeding.

13. Modification Permitted. Nothing in this order shall prevent any party or other person from seeking modification of this order.

14. Responsibility of Attorneys. The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of stamped confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing at the Commission under seal.

15. This Order is issued pursuant to Sections 4(i), 310(d), and 702(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 310(d), 602(d), and authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 83-72
32823

In the Matter of	)	
	)	
Application of GTE Corporation	)	
and Southern Pacific Company for	)	
Consent to Transfer Control of	)	File No. ENF-83-1
Southern Pacific Communications	)	
Company and Southern Pacific	)	
Satellite Company	)	

Memorandum Opinion and Order

Adopted: February 17, 1983 ; Released: February 18, 1983

By the Commission:

1. Before the Commission is an Application for Review filed by MCI Telecommunications Corporation ("MCI") which seeks review of the Chief, Common Carrier Bureau's Order dismissing MCI's opposition to the request for confidentiality made by GTE Corporation ("GTE") and Southern Pacific Company ("SP") with respect to materials submitted by GTE and SP in connection with the above-captioned application. 1/ By letter rulings issued December 2, 1982, the Bureau accorded confidential treatment to certain portions of the application and copies of documents submitted with the application which had been compiled and submitted to the Department of Justice pursuant to the Hart-Scott-Rodino Act. 2/ MCI's opposition to the confidentiality request was filed December 3, 1982. Thereafter, in the Order of which MCI seeks review, the Bureau dismissed MCI's opposition as moot. MCI asserts not only that the Bureau erred in dismissing MCI's Opposition pleading but also that the Bureau ruled incorrectly on the applicants' confidentiality requests. MCI's Application for Review will be denied for the reasons discussed below.

SUMMARY OF PLEADINGS

2. In its Application for Review MCI primarily addresses the merits of whether GTE and SP should have been granted confidential treatment for their documents. MCI contends that GTE and SP did not make a "clear and convincing showing" pursuant to Sections 0.457 and 0.459 of the Commission's Rules, 47 C.F.R. §0.457 and 0.459. MCI alleges that the Bureau's ex parte

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1/ An opposition to the application for review was filed by the applicants and a reply was filed by MCI. The applicants then filed a motion to file further opposition together with a further opposition. MCI filed a further reply. All pleadings have been considered.

2/ 15 U.S.C. 18(h)

grant of confidentiality on December 2, 1982 violated the terms of a November 3, 1982 Public Notice (NO. 608) which indicated that final action would not take place on the application earlier than 31 days following the date of the notice. Further, MCI argues that non-disclosure of the materials defeats the public's right to informed participation in this proceeding.

3. In opposition, GTE and SP assert that the Bureau's dismissal of MCI's opposition to the confidentiality request was proper and consistent with law and policy. GTE and SP contend that the question of confidential treatment is a procedural issue which is usually resolved in advance of the merits of an application. GTE and SP assert that the Hart-Scott-Rodino materials submitted are properly exempt from disclosure under both the Hart-Scott-Rodino Antitrust Improvement Act and Commission precedent. 3/ They contend that they met their burden of proof in demonstrating the likely risk of substantial competitive injury from disclosure of the other documents in their application for which they sought confidential treatment.

4. Notwithstanding their opposition, GTE and SP offer to make all the confidential materials available to MCI under the terms of a proposed protective order, a copy of which GTE and SP submitted for Commission consideration.

5. In its Reply MCI reiterates its procedural and burden of proof arguments. It further asserts that GTE and SP failed to comply with Section 0.459(a) of the Commission's Rules which requires that the materials for which confidentiality is requested be filed simultaneously with the request. MCI contends that the materials the applicants filed on October 27, 1982 could not be considered to be filed simultaneously with the October 26, 1982 joint request for confidential treatment. Further MCI challenges the procedural propriety of handling the confidentiality requests. MCI argues that the fact that there were three overlapping requests for confidentiality and three separate Bureau rulings was not revealed in the public notice thereby causing the public to believe that if it addressed the operative filing cited in the public notice that it would be addressing the matter in its entirety.

6. Next, MCI contends that the Hart-Scott-Rodino materials are not exempt from disclosure because: 1) the statute applies only to attempts by the public to obtain disclosure of information submitted outside of litigation; 2) the materials were supplied voluntarily to the FCC, an agency not identified in the statute; and 3) once MCI's Petition to Deny was filed on December 3, 1982, the proceeding became "restricted" and triggered the limiting language which provides confidentiality for Hart-Scott-Rodino materials insofar as the material is not relevant to any administrative or judicial proceeding. MCI distinguishes GTE-Telenet, 72 FCC 2d 111 (1979), which found Hart-Scott-Rodino materials confidential since that case involved a §214 application, whereas the instant application is filed pursuant to §§308-310 of the Act as well. Moreover, MCI notes that even in GTE-Telenet supra, the Commission released materials upon which it had relied to counsel

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3/ See letter from Chief, Common Carrier Bureau to Dr. Ido Colantuoni dated February 16, 1979, April 13, 1979, and June 8, 1979.

for the parties pursuant to protective agreements.

7. Lastly, MCI maintains that it is entitled to access to the confidential material without the necessity of a protective order. It objects strenuously to the conditions in GTE and SP's proposed protective order which would prevent two of MCI's three counsel of record who are also corporate officers from access to the documents and would preclude review and analysis of the materials by two of three MCI affiants.

DISCUSSION

8. The December 10, 1982 Order under review here did not address substantive issues of confidentiality. It merely dismissed as moot MCI's opposition to GTE/SP's confidentiality requests, filed one day after the Bureau had granted the applicants' requests. Clearly, MCI's pleading was moot because the action its opposition sought to prevent had already been taken. Indeed, MCI's opposition to the request for confidentiality was also untimely and could have been dismissed for that reason, as well. Section 1.45 of our Rules provides that "oppositions to any motion, petition, or request may be filed within 10 days after the original pleading is filed." The confidentiality requests were filed on October 26 and 29, 1982. Thus MCI's opposition was filed three weeks late. 4/

9. Further, the question of confidential treatment is a procedural one and the Bureau properly resolved it separate and apart from its consideration of the merits of the transfer of control application. MCI's assertion that the Bureau's December 2, 1982 rulings were inconsistent with the November 3, 1982 Public Notice is also erroneous. That Public Notice states, in pertinent part, that "Final Action on this application will not be taken earlier than 31 days following the date of this notice." The Bureau's ruling on the applicants' confidentiality requests was not "action on this application" nor was it final.

10. The remainder of MCI's arguments in both its Application for Review and its Reply relate to the merits of the grants of confidential treatment made in the Bureau's December 2 letters, a subject not addressed by the December 10 Order. Nonetheless, despite the procedural infirmities in

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4/ Even if the filing period were measured from the November 3, 1982 Public Notice of the filing of the application, MCI's opposition was late.

MCI's pleadings 5/, we believe that the efficient and expeditious resolution of the application proceeding would best be served by considering the substantive issues related to the Bureau letter rulings granting the confidential treatment requested by the applicants.

11. The applicants' requests for confidentiality relate to two categories of documents. Category I consists of documents or portions of documents contained in the application itself. Category II consists of documents submitted to the Department of Justice pursuant to the Hart-Scott-Rodino Act which the applicants voluntarily filed with the Commission. The Bureau's rulings on these requests were contained in three separate letters dated December 2, 1982. The first letter addressed the applicants' joint request for confidentiality of Category I materials. 6/ The second and third letters addressed each applicant's separate requests for confidentiality of Category II documents. 7/

12. Category I - Pages 18 and 19 of the Stock Purchase agreement contain specific dollar references to the maximum amount of money borrowed by Southern Pacific Communications Co. (SPCC) and Southern Pacific Satellite Co. (SPSC) since June 30, 1982 and to the maximum additional capital expenditure made or committed by SPCC and SPSC. Exhibit 3 consists of 37 pages of numerical tables detailing the operations and financial condition of SPCC and its affiliates. Included in these tables are income statements showing actual results versus budgeted amounts in varying degrees of detail for monthly, yearly and six month periods, and detailed balance sheets for similar time periods. Exhibit 4 contains two pages listing SPCC leases for equipment including the names of the lessors, the amounts and terms of the lease and in may cases the type of equipment. Exhibit 8 is a four page listing of agreements of SPSC for future satellite service. Included are the names of SPSC's customers, the number and type of transponders ordered and in some cases the terms of payment. Exhibit 9 lists two employment agreements (see footnote 10, below). Exhibit 11 is a three page listing of loan guarantees made by SP of loans to SPCC and SPSC. This list contains the name of the lendor, and the principal, interest rate and due date of each loan. In some cases the type of equipment leassed is also listed. Finally, exhibit 12 consists of a nine page outline plus two pages of schedules relating to a

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5/ The proper procedural method MCI should have followed to seek Commission review of the merits of the Bureau's letter rulings granting confidentiality would have been to file an application for review of those actions rather than the action dismissing MCI's opposition. Moreover, the proper method to obtain access to materials not routinely available for public inspection is to file a request pursuant to Section 0.461 of our rules.

6/ Letter from Chief, Common Carrier Bureau to Vincent Gallogly and James M Tobin.

7/ Letters from Chief, Common Carrier Bureau to William T. Lake and Vincent Gallogly, respectively.

proposed $100 million loans from GTE to SP. The outline contains the general terms and conditions of the loan agreement in addition to the principal amount and interest rate disclosed in the body of the agreement between GTE and SP.

13. The applicants requested confidentiality under Section 0.459 of our rules on the ground that the documents were exempt from disclosure pursuant to Section 0.457(d) and Section 554(b)(4) of the Freedom of Information Act. Exemption 4 of the FOIA, which is reflected in Section 0.457(d), permits the withholding of documents that: 1) contain commercial or financial information; 2) are obtained from a person outside the government; and 3) are privileged or confidential. Gulf and Western Industries v. United States, 615 F. 2d 527, 529 (D.C. Cir. 1979); National Parks and Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974) (National Parks I). The Bureau found, and we agree, that the documents are commercial and financial within the meaning of Exemption 4. It is also clear that the documents at issue were obtained from a person outside the government as defined in the Administrative Procedure Act. 8/ The central issue, therefore, is whether the Category I documents are confidential or privileged within the meaning of the exemption.

14. The confidentiality test is met if disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. National Parks I, supra, 498 F. 2d at 770; Gulf and Western, supra, 615 F. 2d at 530. The "competitive harm" test requires a showing that: 1) actual competition exists, and 2) substantial competitive injury would likely result from disclosure. National Parks and Conservation Association v. Kleepe, 547 F. 2d 673, 679 (D. C. Cir. 1976) (National Parks II). To justify withholding a document under Exemption 4 however, it is not necessary to show actual competitive harm. 9/

15. There is no dispute that actual competition exists. Moreover, in this environment, we believe it is "virtually axiomatic" that disclosure of the Category I documents would place SP at a substantial competitive disadvantage. Disclosure of information relating to the details of SPCC's and SPSC's capital expenditures, expenses, equiment leases, and outstanding loans would enable a competitor to guage the financial viability of SPCC and SPSC as well as to determine particular areas of strength and weakness. A competitor armed with this type of information could make adjustments in its own strategic plans to the possible detriment of SPCC and SPSC. Similarly, disclosure of SPSC's customer lists and the number, type and payment for each transponder ordered would aid a competitor in its own efforts to lease or sell

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8/ "Person" within the meaning of this statute includes a corporation. 5 U.S.C. §551(1), (2).

9/ In National Parks II, the court states that a finding of competition, coupled with the detailed and comprehensive nature of the information, means that the likelihood of substantial competitive harm is "virtually axiomatic". 547 F. 2d at 684.

transponders. Consequently, we believe an adequate showing has been made even under the extremely high standard of National Parks II. to bring the Category I documents within the protection of Exemption 4. 10/ However, since the applicants have agreed to make such confidential material available under a protective order, we will permit the parties to inspect these Category I documents pursuant to the attached protective order.

16. Category II - The Bureau's ruling that the Hart-Scott-Rodino materials should be treated as confidential was consistent with our prior ruling in GTE-Telenet, supra. MCI argues, in effect, that we should reconsider the GTE-Telenet ruling. We need not reach that issue because, as discussed below, we have decided to return those documents to GTE and SPCo.

17. In analyzing several proposed mergers, 11/ beginning with GTE-Telenet, supra, the Commission has reviewed information which the applicants had submitted to the Department of Justice pursuant to the Hart-Scott-Rodino Act. Although there is no Commission rule or requirement that such information be submitted to the Commission for consideration, merger applicants have, nevertheless, provided such information pursuant to staff requests. That information is often useful as general background about the applicants and, in some instances, has provided specific material upon which the Commission has relied in its decisions. After GTE-Telenet, supra, requests to inspect such information, for which the applicants have requested confidential treatment, have resulted in protective agreements entered into by the applicants and other parties. Moreover, the volume of Hart-Scott-Rodino documents received in prior mergers has been relatively small in comparison to the situation we face in this case.

18. Initially, the number of documents submitted by GTE and SPCo in this case were similar to the volume submitted in prior mergers. It is these initial submissions which are the subject of the Bureau's ruling on confidentiality. However, both GTE and SPCo have made subsequent filings which total approximately 160,000 pages. The bulk of these materials are

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10/ We note that the Bureau did not find the information in Exhibit 9 to be commerical or financial information which qualified for exemption. That exhibit, entitled "Employment or consulting contracts" merely identifies the existence of agreements between Southern Pacific Company and two officials of Southern Pacific Communications Company relating to the terms of future employment of those officials. The exhibit contains no information as to the content of those agreements other than the dates of the agreements and the names of the officials. Since we agree with the Bureau that this information is not relevant to our analysis of the application and since applicants claim disclosure would cause embrassment to the officials named, we are returning that exhibit pursuant to Section 0.459(e) of our Rules.

11/ Xerox Corporation, 74 FCC 2d 471 (1980); American Satellite Corporation, 80 FCC 2d 254 (1980); Xerox Corporation, 90 FCC 2d 547 (1982).

copies of documents recently submitted to the Department of Justice in response to its request for more information. They were submitted to the Commission on January 26, 1983 by GTE and on February 9 and 16, 1983 by SPCo. The sheer volume of material presents practical difficulties which did not exist at the time the Bureau made its initial ruling on the applicants' requests for confidentiality. It would be difficult for us to make available appropriate space for storage and inspection of those documents. We also lack personnel to adequately monitor access to the documents to assure that none are lost, misplaced or otherwise used incorrectly. In short, with such a massive filing, it is far easier for our staff to inspect the documents on the carrier's premises, than to have it laid out at our headquarters. Accordingly, we have decided to return to GTE and SPCo the documents submitted to us which were also filed with the Department of Justice and for which confidential treatment was requested. These documents are not part of the GTE-SPCo application and were submitted voluntarily to the Commission. We find it administratively burdensome to retain the documents, and our needs can be accommodated by inspecting them on the carrier's premises. Therefore, we will grant the requests of GTE and SPCo that the documents be returned if confidential treatment is not accorded them. See Section 0.459(e) of the Rules.

19. We believe that the staff should continue to complete its review of those documents. Therefore, we are requesting both GTE and SPCo to make them available to the Common Carrier Bureau staff at mutually agreeable times and locations in Washington, D. C. If the staff determines that any information contained in the Hart-Scott-Rodino materials is necessary for Commission consideration in connection with the pending application, we will take appropriate action at that time.

20. Although the applicants requested confidential treatment for the majority of the Hart-Scott-Rodino documents, they did volunteer to make that confidential information available to counsel for the parties pursuant to a protective order. Applicants have expressed a desire to minimize the conflict over access to the documents in order to expedite consideration of their application. We believe that such a desire would still apply, even after the documents have been returned to the applicants. Therefore, we suggest that applicants make the Hart-Scott-Rodino documents available to the parties as planned under a protective agreement. 12/

21. Finally, the parties may file further comment on the merits of the application after reviewing the Category I documents under the attached Protective Order and the Category II documents in the event an agreement can

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12/ Applicants may wish to consider the attached protective order as a model for any protective agreement. It removes some of the provisions of the applicants' proposed protective order to which MCI objected. We also believe it is more consistent with the guidelines for a protective agreement utilized in GTE-Telenet, supra at 168.

be reached concerning their examination. 13/ Such comments shall be filed no later than March 10, 1983. The applicants may respond by March 17, 1983.

22. Accordingly, IT IS ORDERED, That MCI's appplication for review IS DENIED.

23. IT IS FURTHER ORDERED, That the requests of GTE and SPCo for confidentiality of Category II documents, described above, ARE DENIED, and the documents SHALL BE RETURNED to GTE and SPCo pursuant to Section 0.459(e) of the Commission's Rules.

24. IT IS FURTHER ORDERED, That the attached protective order IS ADOPTED and shall become effective on the sixth day after release of this memorandum opinion and order unless GTE or SPCo shall have filed an objection prior to that date.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

13/ Any pleading, motion or other paper filed with the Commission containing or disclosing confidential information should be filed under separate cover of confidentiality.

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 83-73
32824

In the Matter of	)
	)
GTE CORPORATION AND SOUTHERN PACIFIC COMPANY	)
	)
Application for Consent to Transfer Control of Southern Pacific Communications Company and Southern Pacific Satellite Company	)

PROTECTIVE ORDER

Adopted: February 17, 1983 ; Released: February 18, 1983

By the Commission:

GTE CORPORATION ("GTE") and Southern Pacific Company ("SPCo") have filed and may in the future file materials with the Federal Communications Commission ("FCC") that contain confidential business information that parties 1/ to this proceeding may feel is necessary to their review of the above-referenced application. These materials may represent or contain trade secrets or other confidential research, development or commercial information within the meaning of 5 U.S.C. §552(b), 15 U.S.C. §18a(h), 18 U.S.C. §1905, 47 C.F.R. §0.457(c) and (d) or 47 C.F.R. §0.459, may be privileged within the meaning of 47 C.F.R. §§ 0.457 or 0.459.

Neither GTE nor SPCo will waive any of its rights with respect to what constitutes confidential, privileged, or work product material within the meaning of the Commission's Rules or other applicable regulations. However, the need for prompt and orderly analysis and a full and fair review by the Commission and parties to this proceeding make it desirable to afford parties an opportunity to view these materials. Accordingly, the Commission, under Sections 4(i) and (j) (47 U.S.C. §§154(i) and (j)) of the Communications Act, enters this Protective Order so that interested parties may view such confidential materials and, to the extent necessary, file additional comments with the Commission on the merits of the application. The procedures we adopt are to balance the interests of the applicants and

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1/ Satellite Business Systems, American Satellite Company, MCI Telecommunications Corporation, U.S. Telephone Communications, Inc. and The State of Hawaii have filed pleadings in this proceeding.

parties and to create a procedural scheme which protects the rights of both without the need for Commission intervention except where the parties cannot themselves agree.

IT IS ORDERED:

1. This Order shall govern all material marked as "Confidential Information" under the terms of this Order by GTE or SPCo and filed with the Commission in this proceeding. Neither GTE nor SPCo shall be held to have waived the confidentiality of those materials by virtue of parties viewing them. At the same time, however, designating the materials as confidential will not, standing alone, create any presumption for or against such treatment.

2. For purposes of this Order, "Confidential Information" means trade secrets, or confidential research, development or commercial information within the meaning of 5 U.S.C. §552(b), 15 U.S.C. §18a(h), 18 U.S.C. 1905, 47 C.F.R. §§ 0.457 or 0.459, which is contained or disclosed in any material governed by this Order, and designated as "Confidential Information" by GTE or SPCo.

3. Information contained in material for which a claim of confidential status is made shall be designated as Confidential Information by stamping "Confidential Information" on the face of such material. The stamping of such material is to be done before filing such material with the Commission.

4. Unless and until the Commission otherwise rules, all information designated in accordance with paragraph 3 shall be treated by counsel for all parties as required by paragraph 5 below and shall be used by such counsel solely for purposes of this proceeding and any subsequent judicial proceedings. Information so designated may be reviewed and copied by counsel of record, but shall not be used or disclosed by any such counsel to any other person except as set forth in this Order, or unless agreed to in writing by counsel for GTE or SPCo, or as may be permitted by subsequent order of the Commission. Information so designated may be disclosed by counsel only as follows, and only after complying with the procedures set forth herein:

5. Confidential Information may be disclosed:

(a) To counsel of record, their associated attorneys, paralegals, and clerical staff employed in the preparation of materials for this matter.

(b) To any person requested by counsel to furnish technical or other expert services, or otherwise to prepare material for this matter, except that disclosure to a party's personnel in a position to use the information for competitive commercial or business purposes shall be limited to the minimum extent disclosure to such party personnel is needed by counsel of record to obtain analysis and management guidelines for this proceeding.

6. Counsel inspecting or copying Confidential Information shall: a) be deemed by such act to have agreed to comply with the terms of the Order, and such agreement also to be deemed binding on persons then or thereafter represented by such counsel in this matter, such agreement to survive the termination of such representation; (b) disclose such information to persons to whom disclosure is permitted under the terms hereof only after advising such person of the terms hereof and obtaining the agreement in writing of such person to be bound by terms hereof; and c) provide to GTE or SPCo, as the case may be, the name and affiliation of each person to whom disclosure will be made together with copies of the written agreements referred to in subparagraph b) hereof prior to such disclosure.

7. All materials designated as Confidential Information and any pleading motion or other paper filed with the Commission containing or disclosing such information, shall be available to the Commission. Where possible, portions of filings so designated shall be filed separately and under cover of confidentiality.

8. Receipt of materials described herein shall not be deemed a waiver by SPCo or GTE in any other proceeding, agency or court, of any privilege or entitlement to confidential treatment which could be raised by SPCo or GTE. Inspecting parties, by viewing said documents: a) agree not to assert any such waiver; b) agree not to use information derived from any confidential materials to seek disclosure in any other proceeding; and c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

9. Upon final termination of this matter, GTE and SPCo may request the return of all previously furnished material, including any copies thereof, and each person or party to whom such material has been furnished or produced shall be obligated to return the same, including any copies and shall certify that no quotes or extracts from such materials have been retained.

10. The entry of this Order is without prejudice to the rights of GTE or SPCo to apply for additional or different protection where it is deemed necessary.

11. Nothing herein shall be construed to limit the right of the Commission to issue additional orders in this proceeding concerning the confidentiality of material submitted or to limit the Commission's determination of the status to be accorded such material upon entry of an order on the merits of the pending application.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

ACKNOWLEDGEMENT OF CONFIDENTIALITY

I hereby acknowledge that I have read and received a copy of the foregoing Protective Order in the above-captioned proceeding, and I agree that I am bound by this Order and that I shall not disclose or use documents or information designated as "Confidential Information" or any information gained therefrom except as allowed by the Order.

Executed at , this day of , 1983.

_____

Signature

_____

Title

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-445
Washington, D.C. 20554

In the Matter of	)
	)
FIDELITY CABLEVISION, INC.	)
	)
Petition for Emergency Relief	)
	)

Order

Adopted: September 16, 1993 **Released:** September 21, 1993

By the Commission:

I. Introduction

1. In this Order, we deny a petition for emergency relief filed by Fidelity Cablevision, Inc. ("Fidelity"),[1] seeking a waiver of the temporary freeze of regulated cable service rates.[2]

II. Background

2. In the Rate Freeze Order, the Commission temporarily froze rates of cable services subject to regulation under the Cable Act of 1992[3] in order to assure that, pending implementation of cable service rate regulation, cable operators could not raise rates, effectively undermining the statutory goal

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[1] Petition for Emergency Relief, filed by Fidelity Cablevision, Inc., July 21, 1993 ("Petition").

[2] Rate Freeze Order, MM Docket 92-266, 8 FCC Rcd 2921 (1993), clarified, 8 FCC Rcd 2917 (1993); extended, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993).

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking ("Report and Order"), MM Docket 92-266, FCC 93-177 (released May 3, 1993), 58 FR 29736 (May 21, 1993), adopting regulations implementing Sections 623, 622(c), and 612 of the Cable Act of 1992.

that cable service rates remain reasonable.[4] The regulatory framework governing cable service rates became effective September 1, 1993,[5] and the temporary freeze of regulated cable service rates extends to November 15, 1993.[6] The temporary freeze affords local franchising authorities an opportunity to become certified to regulate the basic service tier and consumers to become familiar with and exercise their rights to invoke Commission oversight over cable programming service tiers.[7] In the Rate Freeze Order the Commission provided for waivers in particular cases. We stated that we would consider lifting the freeze for a particular cable system if it can show that the freeze would impose severe economic hardship or threaten the vaibility of continued cable service.[8]

III. Petition

3. Fidelity states that it owns and operates a cable television system in Rolla, Missouri serving approximately 5,600 subscribers. It states that it purchased this system in February 1992 from the previous operator whose franchise renewal had been denied because of the operator's failure to meet technical and service requirements. Fidelity states that it made commitments to the franchising authority to upgrade plant and equipment and

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[4] See Rate Freeze Order, 8 FCC Rcd at 2921.

[5] See Order, FCC 93-372 (released July 27, 1993), 58 FR 41042 (August 2, 1993).

[6] The Rate Freeze Order initially froze rates for cable service until August 3, 1993. The Commission subsequently extended the freeze until November 15, 1993 in conjunction with a deferral of the effective date of rate regulation until October 1, 1993. Deferral Order, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993).

[7] The Rate Freeze Order requires that the average monthly subscriber bill for cable services subject to rate regulation under the Cable Act of 1992 may not increase above that determined under rates in effect on April 5, 1993, the date of publication of the Rate Freeze Order in the Federal Register. The freeze does not preclude the addition of subscribers, programming offerings, equipment or other services as long as the average monthly subscriber bill is maintained during the freeze period. The freeze permits operators to make reasonable changes in the structures of their tiers of service in response to the newly established rate regulations while still protecting consumers from rate increases. Rate Freeze Order, 8 FCC Rcd at 2921-22.

[8] Rate Freeze Order, 8 FCC Rcd at 2921-2 n.6.

that it has expended approximately $526,000 to, among other things, improve the system's headend and increase the number of channels. Fidelity states that surveys show a dramatic increase in customer satisfaction after these service improvements.

4. Fidelity states that in exchange for the system upgrades, the City of Rolla approved Fidelity's plans to increase its cable service rates to help recover upgrade costs[9] and to repay a bank loan associated with its acquisition of the system. In order to avoid "rate shock" to subscribers, Fidelity states that it decided to accomplish the necessary rate increase gradually over several years. After completing the upgrade construction, Fidelity states that it increased its rates for cable service in July 1992, with the expectation of further raising its rate in July 1993.

5. Fidelity states that the freeze prevented it from increasing rates as anticipated in July 1993, severely harming its financial position.[10] Fidelity states that it had a net cash shortage of nearly $900,000 for the year ending April 30, 1993,[11] and will experience a net cash shortage of over $520,000 absent the rate increase it planned to put into effect in July 1993.[12] Fidelity states that its parent company has funded most of the cash shortfalls to date but that given other commitments such funding cannot continue.[13] Fidelity states that granting its petition will permit it to decrease its cash flow shortage for the year ending April 30, 1994, by $204,409, from $526,325 to

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[9] In the Petition, Fidelity characterizes its requested rate increase as necessary, in part, to recoup its costs for upgrading the system, as approved by the City. Petition, at 3-4.

[10] Petition, at 10. In addition, Fidelity argues that the rate freeze, as applied to Fidelity, may be confiscatory under the Takings Clause of the Fifth Amendment. Petition at 10-11 n.29.

[11] Fidelity appends a schedule indicating that it experienced a net cash shortage for the Year Ended April 30, 1993 of $890,112. This shortage takes into account Fidelity's payments for interest on the long-term debt and all operating expenses, and includes a portion of Fidelity's one-time upgrade costs as well as Fidelity's quarterly payments on the principal of its long-term acquisition debt. Petition, at Exhibit H.

[12] Petition, at Exhibit H.

[13] Petition, at 4 n.10.

$321,916.[14] It states that during the period of the freeze it will forego income of more than $100,000 that could be used to recoup its capital expenditures.[15]

6. Fidelity also states that a waiver of the rate freeze is warranted because its continued provision of cable service to Rolla is threatened by violation of loan covenants that could lead to foreclosure on its acquisition loan. Fidelity states that it was already in violation as of December 31, 1993 of covenants that require net worth of $445,000 as of that date, and that the freeze only worsens the situation.[16]

IV. Discussion

7. We will waive the temporary rate freeze if it is shown in an individual instance that: (1) it imposes severe economic hardship, or (2) it threatens the viability of continued cable service. We address in turn whether Fidelity has met either of these alternative grounds for waiver of the freeze.[17]

8. Severe Economic Hardship. Fidelity's schedule of cash requirements for the year ending April 30, 1994, without its planned rate increases, shows that after payment of all cash expenses including interest expense, other than "investing activities"[18] and repayment of long term debt, it has a positive cash flow from operating activities of $269,000. After projected cash expenditures of $120,000 for investing activities and $675,000 for repayment of long term debt, however, it projects a net cash shortage of $526,325 for this period without the requested rate increase.

9. These facts do not show that the temporary feeeze imposes a severe economic hardship on Fidelity. Fidelity seeks to measure the impact of the freeze primarily based on the additional revenue that will not be received absent the requested rate increase over the one year period prior to April 30, 1994. However, the freeze extends only until November 15, 1993, and

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[14] Petition, at Exhibit H.

[15] Petition, at 5.

[16] See Petition, at 4-5, and Exhibit C, p.14.

[17] Petitioners have a high burden to justify waiver from rules of general applicability. See generally, WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

[18] Fidelity does not further identify or describe its projected investing activities.

after that date, the rates that Fidelity may charge will be governed by our framework for regulation of cable service rates that became effective September 1, 1993. Fidelity can ameliorate its alleged economic hardships by raising rates consistent with that framework after the expiration of the freeze to the extent its proposed rates are reasonable under our regulations.[19] It may also seek permission from its local franchising authority (if certified) to raise rates for the basic service tier on an emergency basis.[20] Thus, if Fidelity's proposed rates are reasonable under our regulations, it will be able to obtain relief after expiration of the freeze even if we do not grant a waiver of the freeze and permit Fidelity to raise rates now. Conversely, if we were to grant the waiver now and permit Fidelity to raise rates, Fidelity may be required to reduce rates and/or incur refund liability if those rates subsequently are found to be unreasonable by regulators. Thus, granting Fidelity its requested relief may not in any event permit it to reduce its perceived economic hardships to the extent it presumes. Accordingly, we believe that the extent to which the freeze imposes a severe economic hardship should be measured by its impact during the time it is in effect, not for the year ending April 30, 1994.

10. Fidelity has not shown that the foregone revenues during the period between the filing of its petition and the termination of the freeze is causing severe financial hardship. While the freeze prevents Fidelity from obtaining additional revenues that it had anticipated receiving during that period, it appears that these additional revenues would merely offset some of the net cash shortage that would otherwise occur and that apparantly was planned for by Fidelity and its parent company in their acquisition of the Rolla cable system. Based on information submitted by Fidelity, it appears that approximately $90,000 in otherwise anticipated revenue will be attributable to

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[19] Fidelity avers that it will be able to justify its proposed rates either under the benchmark or cost-of-service approaches. However, it has not submitted any calculations, such as would be required in FCC Form 393, that would show that its proposed rates are reasonable under the benchmark approach. Nor are we called upon to determine in this proceeding whether the cost information submitted by Fidelity would generally justify its proposed rates under general cost-of-service principles.

[20] Our rules do not preclude consideration by certified local franchise authorities of rate increase requests on an expedited or emergency basis.

$321,916.[14] It states that during the period of the freeze it will forego income of more than $100,000 that could be used to recoup its capital expenditures.[15]

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8. Severe Economic Hardship. Fidelity's schedule of cash requirements for the year ending April 30, 1994, without its planned rate increases, shows that after payment of all cash expenses including interest expense, other than "investing activities"[18] and repayment of long term debt, it has a positive cash flow from operating activities of $269,000. After projected cash expenditures of $120,000 for investing activities and $675,000 for repayment of long term debt, however, it projects a net cash shortage of $526,325 for this period without the requested rate increase.

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[18] Fidelity does not further identify or describe its projected investing activities.

after that date, the rates that Fidelity may charge will be governed by our framework for regulation of cable service rates that became effective September 1, 1993. Fidelity can ameliorate its alleged economic hardships by raising rates consistent with that framework after the expiration of the freeze to the extent its proposed rates are reasonable under our regulations.[19] It may also seek permission from its local franchising authority (if certified) to raise rates for the basic service tier on an emergency basis.[20] Thus, if Fidelity's proposed rates are reasonable under our regulations, it will be able to obtain relief after expiration of the freeze even if we do not grant a waiver of the freeze and permit Fidelity to raise rates now. Conversely, if we were to grant the waiver now and permit Fidelity to raise rates, Fidelity may be required to reduce rates and/or incur refund liability if those rates subsequently are found to be unreasonable by regulators. Thus, granting Fidelity its requested relief may not in any event permit it to reduce its perceived economic hardships to the extent it presumes. Accordingly, we believe that the extent to which the freeze imposes a severe economic hardship should be measured by its impact during the time it is in effect, not for the year ending April 30, 1994.

10. Fidelity has not shown that the foregone revenues during the period between the filing of its petition and the termination of the freeze is causing severe financial hardship. While the freeze prevents Fidelity from obtaining additional revenues that it had anticipated receiving during that period, it appears that these additional revenues would merely offset some of the net cash shortage that would otherwise occur and that apparantly was planned for by Fidelity and its parent company in their acquisition of the Rolla cable system. Based on information submitted by Fidelity, it appears that approximately $90,000 in otherwise anticipated revenue will be attributable to

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[20] Our rules do not preclude consideration by certified local franchise authorities of rate increase requests on an expedited or emergency basis.

the period of the freeze.[21] Fidelity has not shown that the amount of this additional shortfall, against the backdrop of the net cash shortfall of $321,916 it had already anticipated, is so great as to create a severe economic hardship.[22]

11. In addition, it appears that the additional revenue sought by Fidelity would be used primarily to retire its acquisition debt for the Rolla system.[23] It does not appear that a significant amount of the additional revenues, if any, would be used to pay for the system improvements undertaken in connection with its acquisition.[24] Therefore, the practical impact of the freeze is to require that Fidelity's owners make a relatively greater contribution of funds than initially anticipated to retire a portion of the debt incurred to acquire the cable system, rather than using funds from rate increases for this purpose. While this practical impact will require Fidelity's owners to advance additional funds, we cannot conclude that this

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[21] Fidelity seeks a waiver from the rate freeze in order to increase its monthly rates for cable service by $4 for each of its approximate 5,600 subscribers, or $22,400 per month in total additional revenues. The relevant period for such an increase is approximately four months, extending from the filing date of Fidelity's petition, July 21, 1993, until the expiration of the rate freeze, November 15, 1993. Thus, Fidelity's requested rate increase will result in additional revenues of approximately $89,600, and not Fidelity's asserted $204,409.

[22] Fidelity's schedule of cash requirements with the requested rate increase shows a net cash shortage of $321,916 for the year ending April 30, 1994. Petition, at Exhibit H.

[23] Petition, at Exhibit H. Fidelity has not submitted firm evidence that the City of Rolla has approved its proposed rate increases. As evidence in support of local approval, Fidelity has attached a letter from the Mayor of Rolla and its franchise agreement. However, the letter attests to Fidelity's good faith and the City's satisfaction with the system upgrades, but does address or approve rate increases. Petition, at Exhibit J. Although Fidelity's franchise agreement indicates the City's approval of Fidelity's initial increase in rates from those charged by the original operator, it does not address any future rate increases such as sought by the waiver. Petition, at Exhibit D.

[24] Fidelity states that its acquisition indebtedness was approximately $4,400,000 and that its system improvements cost approximately $526,000. Petition, at I. Thus, assuming that its debt covered both the acquisition price and system improvements, only a small portion of loan payments would be for system improvements.

constitutes a severe economic hardship. Moreover, Fidelity has not substantiated its claim that its parent company is unable to contribute additional funds. Nor has it provided any evidence that foreclosure proceedings have been iniated by its lender or are imminent as a result of the temporary freeze.[25]

12. Continuation of Cable Service. Assuming arguendo that its parent company will not, in fact, provide sufficient funds to meet loan commitments, we are not persuaded that application of the temporary freeze threatens continued cable service. As noted above, Fidelity has provided no information that foreclosure proceedings have been, or will be initiated by its lender. Nor is there anything in the record to suggest that the City of Rolla fears disruption of cable service in the absence of waiver of the temporary rate freeze. In addition, any foreclosure is most likely to be accompanied by mechanisms seeking to prevent any disruption of service that could harm lenders' or subscribers' interests. Accordingly, Fidelity has not shown that waiver of the freeze is needed in order to assure a continuation of cable service.

13. In view of the foregoing, we conclude that Fidelity has not made a sufficient showing for waiver of the temporary freeze of cable service rates until November 15, 1993. We will therefore deny its waiver request.

V. Ordering Clause

14. Accordingly, IT IS ORDERED, that the petition for emergency relief filed by Fidelity Cablevision, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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[25] Fidelity also has failed to show that the temporary freeze will prevent it from attracting capital or earning a return over the life of its investment commensurate with returns on investments in other enterprises having corresponding risks. Thus, it has failed to show that the freeze produces a confiscatory result as applied to it. See FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944).

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-446
Washington, DC 20554

In the Matter of	)	
Implementation of	)	
Sections of the Cable Television	)	MM Docket No. 92-266
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Rate Regulation	)	

ORDER

Adopted: September 17, 1993 Released: September 17, 1993

By the Commission:

1. The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992") requires the Commission to ensure that rates for basic cable service and associated equipment are reasonable, and that, in individual instances, rates for cable programming services and associated equipment are not unreasonable.[1] We have established a comprehensive regulatory framework governing cable rates designed to achieve the statutory mandate that cable rates remain reasonable.[2] Concurrently, we temporarily froze revenues for regulated cable services measured by rates in effect on April 5, 1993 in order to ensure that rates remain reasonable pending implementation of rate regulation by local franchising authorities and the Commission.[3] In order to facilitate compliance with rate regulation, we additionally established transition mechanisms to permit cable operators to restructure rates and service offerings prior to implementation of rate regulation.[4] For those cable systems serving more than 1,000 subscribers, our regulations governing cable rates became effective on September 1, 1993.[5]

2. By this order, we are instituting a survey of cable rate changes and service

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[1] Communications Act, Section 623, 47 U.S.C. Section 543.

[2] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MM Docket 92-266, FCC 93-177 (released May 3, 1993), 58 F.R. 29736 (May 21, 1993), reconsideration in part, FCC 93-428 (released August 27, 1993), further reconsideration pending .

[3] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Order, FCC 93-176, 8 FCC Rcd 2921 (1993), clarified in 8 FCC Rcd 2917 (1993), extended to November 15, 1993, in Order, 93-304 (released June 15, 1993), 58 F.R. 33560 (June 18, 1993).

[4] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Order, FCC 93-372 (released July 27, 1993), 58 F.R. 41042 (August 2, 1993).

[5] Id; Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 93-989 (released August 10, 1993), 58 F.R. 43816 (August 18, 1993).

restructuring as of the starting date of our rate freeze and at the initiation of rate regulation. This survey directs the twenty-five largest multiple system operators ("MSOs") to complete a questionnaire with respect to their ten largest cable systems that the operator anticipates being governed by benchmark regulation.[6] The questionnaire requests information on rates for regulated cable services, the average per subscriber regulated revenues for the last billing cycle ending before April 5, 1993, and projected average per subscriber regulated revenues based on rates in effect September 1, 1993. The surveyed operators must also provide their rate cards and channel line-ups in effect on April 5, 1993 and September 1, 1993. As a separate attachment, operators are required to identify any systems that the operator anticipates being governed by cost-of-service regulation that exceed in size the smallest of the reported benchmark regulated systems.[7] This survey will permit a review of rate changes and service restructuring of cable operators providing service to approximately seventy-five percent of cable subscribers[8] in light of the requirements of the freeze and the requirements of our September 1, 1993 rate regulations.[9]

3. We do not believe that the filing of this survey and associated information will be burdensome for the respondents. Additionally, we do not anticipate that the data requested will be competitively sensitive. However, systems seeking proprietary treatment for some data should submit their response pursuant to Section 0.459 of the Commission's rules.[10]

4. Respondents are required to provide the information requested in this survey in responses postmarked no later than October 1, 1993.[11] Respondents are required to file this form and data requested either on computer disk in Lotus 1-2-3, version 3.1 or in typewritten

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[6] The cable operators subject to this survey are: Tele-Communications, Inc.; Time Warner Cable; Continental Cablevision, Inc.; Comcast Corporation; Cablevision Systems Corporation; Cox Cable Communications; Jones Intercable, Inc.; Newhouse Broadcasting Corporation; Cablevision Industries, Inc.; Adelphia Communications; Times Mirror Cable Television; Falcon Cable TV; Viacom Cable; Sammons Communications, Inc.; Century Communications Corp.; Crown Media, Inc.; Colony Communications, Inc.; TeleCable Corporation; Scripps Howard Cable; TKR Cable; KBLCOM, Inc. (Houston Industries); Lenfest Group; Intermedia Partners; Prime Cable; and Post-Newsweek Cable, Inc. NCTA, Cable Television Developments, at 14-A (June 1993).

[7] For example, if the operator's tenth largest surveyed system that will be governed by the benchmark is the operator's twenty-third largest system overall without regard to the manner of rate regulation of the system, the operator would identify in a separate attachment all thirteen intermediate sized systems that the operator anticipates being subject to cost-of-service regulation. Operators shall additionally identify by community unit identification number any individual franchise areas within such systems for which the operator plans to make a cost-of-service showing. We reserve the right to seek additional data.

[8] See NCTA, Cable Television Developments, at 1-A and 14-A (June 1993).

[9] Section 623 of the Communications Act of 1934, as amended, 47 U.S.C. section 543, requires the Commission to prescribe, and periodically revise, regulations governing rates for regulated cable services. Under Section 4(i) of the Communications Act, the Commission is permitted to perform any and all acts, including issuing orders, not inconsistent with the Act and that are necessary in the execution of its functions. Communications Act, Section 4(i), 47 U.S.C. Section 154(i). This survey will allow the Commission to examine the effect of its regulations on regulated cable service rates on April 5, 1993, the date of the Commission's rate freeze, and on September 1, 1993, the effective date of the Commission's cable rate regulations.

[10] 47 C.F.R. Section 0.459.

[11] The Office of Management and Budget, acting under the Paperwork Reduction Act of 1980, 44 U.S.C. 3507, approved the appended survey form on September 16, 1993. The OMB approval number is 3060-0578, and the form expires on December 16, 1993.

form. [12] The survey form is to be used only once. Respondents shall file the survey data with the Mass Media Bureau, Cable Rate Regulation Impact Survey, Room 314, 1919 M Street, N.W., Washington, D.C. 20554.

5. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i) and 543, that cable operators subject to this data collection, as indicated in footnote 6, shall complete and return this survey set forth in the attached Appendix in responses postmarked no later than October 1, 1993.

6. IT IS FURTHER ORDERED, That this Order IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[12] The Commission is mailing to the respondent cable systems on the release date of this Order, a formatted 3 1/2 diskette containing an appropriate worksheet in Lotus 1-2-3, version 3.1.

FCC Rate Regulation Impact Survey

This survey is intended to collect data on the impact of FCC rate regulations on cable services and equipment offerings. Operators must complete the following questionnaire for each of the ten largest systems that the operator anticipates being governed by FCC benchmark regulation. The operator should identify, in a separate attachment, any systems that the operator anticipates being governed by cost of service regulation that exceed in subscriber count the smallest of the reported benchmark regulated systems. The questionnaire requests information on rates for regulated cable services, the average per subscriber regulated revenues for the last billing cycle ending before April 5, 1993, and projected average per subscriber regulated revenues based on rates in effect September 1, 1993.

If the effective date of the most recent rate change subsequent to April 5, 1993 was not September 1, 1993, the operator should complete the questions in this survey based on the actual effective date of the rate change. If there has been no change in rates during the rate freeze (April 5, 1993 through November 15, 1993) the operator should supply all data for rates currently in effect in the columns for April 5, 1993.

Responding Official: This survey should be completed by a company official familiar with the development of the rates currently in effect. The data required include subscriber revenues, rates for cable service and equipment and number of subscribers.

Instructions: (A) Complete the attached questionnaire. Both paper and disk forms are being provided. We would prefer the operator use the disk form. The disk file is in the format of Lotus 1-2-3, version 3.1. Please change the name of the file to the first eight letters of the operator's holding company name and enter the data for each of the ten franchises in one file. The holding company name and the name and phone number of the responding official should be written on the label of the disk. (B) Attach rate cards and channel line-ups for April 5 and September 1, 1993.

When and Where to File: The questionnaire and attachments should be returned postmarked no latter than October 1, 1993. The return address is: FCC Rate Regulation Impact Survey, Mass Media Bureau, Room 314, 1919 M Street NW, Washington, D.C. 20554.

Help: Call John Hays (202) 634-1798 between the hours 9:30 AM and 5:00 PM EST.

Confidentiality: All data submitted in response to this survey will be considered a part of the public record and will be provided upon request to interested parties. Requests for confidentiality will be considered on a case by case basis.

Line Instructions:

Lines 01 - 08: Enter the specified identification information for each of the ten largest systems that you own and operate and that you anticipate being regulated under the FCC benchmark regulations. For identification purposes, please enter the community unit ID of the largest franchise in each system on line 01. If rates charged by the operator are uniform for all franchises in a system, provide information on the remaining lines of this questionnaire at the system level and enter "system" on line 08. If rates are not uniform for all franchises, provide data for the largest franchise in each system and enter "franchise" on line 08.

Lines 09 - 12:

Description of Service: Enter a brief description to identify each tier of service offered on April 5, 1993 and on September 1, 1993. To the extent not shown on the form,

attach a separate paragraph explaining any additions or deletions of tiers. List only the tiers that are subject to regulation by either local franchise authorities or, on complaint, by the FCC.

Charges: The charges should be the rates generally available to residential households.

Channels: Enter the number of channels.

Households: Enter the number of subscribers taking service at the generally available rates. Include subscribers receiving bulk discounts or senior citizen discounts.

Line 13: Enter the monthly charges, number of equipment units, and the number of households with equipment. If an addressable converter is not required to receive the highest level of regulated service, enter zeros in the boxes referring to addressable converters. If a converter is not needed to allow a cable-ready television to receive all regulated service, enter zeros in the boxes referring to non-addressable converters.

Line 14: Enter the charges for installing service for one outlet in a single family residence.

Line 15: Enter the charge for a change in service level (for regulated services only). If no visit is required, enter a zero in the appropriate box.

Line 16: Enter the monthly charge for inside wire maintenance. Enter a zero if there is no charge.

Line 17: Enter the monthly charge for a remote control.

Line 18: Enter the monthly charge for a second outlet that is to only receive regulated services.

Lines 19 -20: Enter a brief description and the monthly charge for any recurring maintenance charge that is generally required to received regulated services.

Lines 21 - 23: Enter a brief description and the monthly charge for any other recurring charge that is required to receive a regulated service.

Line 24: If franchise fees are not included in the charges listed above, enter the franchise fee for the highest level of regulated service. If the franchise fee is included in the above charges, enter a zero in the appropriate boxes.

Line 25: Enter the sum of billed monthly charges for all regulated services. (Round to the nearest thousand dollars). For April 5, enter actual billed revenue for the last billing cycle ending before April 5, 1993. For September 1, enter projected revenue based on rates in effect on September 1, 1993.

Line 26: Enter the total number of customers that received any regulated services. (Enter in whole numbers).

Line 27: Enter the percentages of customers that would experience a reduction or increase in their bill for regulated service based on the rates in effect on September 1, 1993.

Federal Communications Commission
Washington D.C. 20554
Page 1

Approved by OMB
3060-0578
Expires 12/16/93

FCC RATE REGULATION IMPACT SURVEY

01. Community Unit ID#:		05. Respondent Name:	
02. Mailing Address (street):		06. Respondent Fax:	
03. Mailing Address (city):		07. Respondent Phone:	
04. Mailing Address (state & zip):		08. System/Franchise:	

REGULATED SERVICES	CHARGE		CHANNELS		HOUSEHOLDS	
Describe Service Tier	4/5/93	9/1/93	4/5/93	9/1/93	4/5/93	9/1/93
09. TIER 1 (Basic)						
10. TIER 2						
11. TIER 3						
12. TIER 4						

REGULATED EQUIPMENT		CHARGE		EQUIPMENTUNITS		HOUSEHOLDS	
		4/5/93	9/1/93	4/5/93	9/1/93	4/5/93	9/1/93
13. Converter	Non-addressable:						
	Addressable:						
14. Installation	Prewired:						
	Unwired:						
15. Service Change	Visit required:						
	No visit:						
16. Inside Wire:							
17. Remote:							
18. Additional Outlet:							
All Miscellaneous Maintenance (describe):							
19.							
20.							
All Miscellaneous charges (specify):							
21.							
22.							
23.							
24. Franchise Fee:							
25. Total billed monthly charges for reg. services:							
26. Total subscribers receiving any reg. services:							
27. % of subs. receiving a change in bill for reg. svcs:		Increase%		Decrease%			

2641

September 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-457

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

SECOND REPORT AND ORDER

Adopted: September 23, 1993; Released: October 22, 1993

By the Commission:

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I. INTRODUCTION

1. This Second Report and Order adopts rules to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which adds a new Section 616 to the Communications Act of 1934 governing agreements between cable operators -- or other multichannel video programming distributors -- and the programming services they distribute.[1] Section 616 is intended to prevent cable systems and

[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. (1992).

other multichannel video programming distributors ("multichannel distributors") from taking undue advantage of programming vendors through various practices, including coercing vendors to grant ownership interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems. As we have developed regulations pertaining to program access and carriage agreements in this proceeding, we have endeavored to serve the congressional intent to prohibit unfair or anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace. Therefore, the implementing rules for program carriage agreements that we adopt are intended to prohibit those activities specified by Congress in the statute without unduly interfering with legitimate negotiating practices between multichannel video programming distributors and programming vendors. As a result, in this Second Report and Order, we adopt general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements, and we will enforce these regulations through a process that will focus on the specific facts pertaining to each negotiation.

II. BACKGROUND

2. When drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry have created an imbalance of power between cable operators and program vendors. Specifically, Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems. Cable operators or programmers that compete with the vertically integrated entities may suffer harm to the extent that they do not receive such favorable terms.[2] Congress also found that some cable operators have required certain non-affiliated program vendors to grant exclusive rights to programming, a financial interest in the programming, or some other additional consideration as a condition of carriage on the cable system.[3]

3. The program access provisions of the 1992 Cable Act discussed in the First Report and Order[4] primarily restrict the activities of vertically integrated programming vendors with respect to cable operators and other multichannel programming distributors. Section 616 restricts the activities of cable operators and other multichannel programming distributors when dealing with programming vendors.

4. Specifically, Section 616 requires the Commission to adopt regulations that prevent a multichannel distributor from: (1) requiring a programming vendor to provide it with a financial interest in the programming service as a condition of carrying the program service on its system; (2) coercing a programming vendor to provide it with exclusive rights as a condition of carriage, from retaliating against such a vendor for failing to provide exclusive rights; or (3) engaging in conduct that discriminates on the basis of affiliation of vendors in the selection, terms or conditions for carriage of video programming. In addition, the statute specifies procedures the Commission must adopt for implementation of the above

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[2] 1992 Cable Act, Section 2(a)(5).

[3] See Senate Report at 24; House Report at 42.

[4] See First Report and Order ("First Report and Order"), MM Docket No. 92-265, 8 FCC Rcd 3359 (1993).

provisions, including expedited review of complaints made by a programming vendor and assessment of appropriate penalties for violation of the carriage agreement rules as well as for the filing of frivolous claims. In our Notice of Proposed Rulemaking,[5] the Commission sought comment on specific practices that it should prohibit, as well as on appropriate complaint procedures for addressing allegations of conduct that violates our implementing regulations.

III. IMPLEMENTATION OF CARRIAGE AGREEMENT PROVISIONS

5. Section 616(a)(1) of the 1992 Cable Act provides that the Commission must adopt rules to prevent a cable operator or other multichannel distributor from requiring a financial interest in a program service as a condition for carriage on the operator's systems. Given that the statute does not prohibit multichannel distributors from holding a financial interest in a programming service, the Notice stated that it may not always be clear whether a cable operator has "required" the programming vendor to provide a financial interest as a condition of carrying a particular programming service. Therefore, we sought comment on the factors we should use to determine whether such a requirement for carriage has occurred.

6. Second, Section 616(a)(2) directs the Commission to adopt rules that prohibit a cable operator or other multichannel distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage. In this regard, we sought comment on (1) the types of activities that should constitute indicia of coercion; (2) how we might distinguish between "coercion" and "negotiation"; and (3) whether our implementing rules for Section 616 might preclude as "coercion" certain mutually acceptable arrangements that would otherwise comply with Section 628. Further, the statute clearly states that exclusive arrangements may exist other than as a condition of carriage. Therefore, we also sought comment on our interpretation that Section 616 does not prohibit exclusive arrangements, but that Section 616 must be read together with Section 628(c), which precludes certain exclusive arrangements and establishes standards for determining whether other exclusive contracts are in the public interest.

7. Third, Section 616(a)(3) provides that the new rules must prevent a multichannel distributor from engaging in conduct that unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming. In the Notice, we sought comment on the specific conduct that we should consider a violation of this section. We also proposed that an "unaffiliated video programming vendor" would be a video programming vendor or service in which the multichannel distributor does not have an attributable interest, which could be defined by the broadcast attribution criteria of Section 73.3555 of the Commission's Rules. In addition, we observed that Section 616(a)(3) prohibits multichannel distributors from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors." We stated our belief that a practice of discriminating in the context of carriage agreements involves different activities than those discussed with respect to Section 628 regarding programming access, and we sought

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[5] See Notice of Proposed Rulemaking ("Notice"), MM Docket No. 92-265, 8 FCC Rcd 194 (1992).

comment on how we should define "discrimination" in the context of Section 616.[6]

Comments

8. General Issues. Several commenters raise general issues regarding the carriage agreement provisions of Section 616. MPAA states that the intent of Section 616 is to ensure that no cable operator or multichannel distributor can demand ownership interests or exclusive rights in programming services in exchange for carriage. Furthermore, MPAA argues that Congress sought to prevent distributors from discriminating in terms of carriage against programming services in which the operator has no ownership interest.[7] Therefore, MPAA claims that the statute clearly proscribes coercive and discriminatory conduct, and that the Commission's rules must discourage such practices and provide effective remedies. To the extent that it is neither possible nor necessary for the rules to define every type of conduct that could evidence coerced or required concessions, MPAA and Time Warner suggest rules using generic language, perhaps amplified by illustrative examples in notes appended to the rules, that may be invoked by individual complaints on a case-by-case basis.[8] MPAA also contends that the Commission should interpret the congressional intent regarding the carriage agreement provisions of Section 616 independently of the intent of the program access provisions of Section 628, especially concerning the respective standards concerning exclusivity.[9] Similarly, Viacom believes that the competitive problems targeted by Section 616 are more pervasive than the program access issues addressed in Section 628, and thus warrant different and more stringent standards.[10]

9. Alternatively, several parties observe that Section 616 does not prohibit distributors from obtaining financial interests or exclusivity rights, but instead addresses "coercive" conduct and "unreasonable restraints" by distributors, for which direct evidence is available.[11] These parties thus assert that the Commission's implementing rules should only reach conduct that is beyond the normal course of negotiations. Furthermore, Continental believes that imposition of remedies under Section 616, if not subject to sufficient limits, may force distributors to make carriage decisions based on an expectation

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[6] We note that with respect to these carriage agreement rules, the House Report indicates that "the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act." The House Report further provides that the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices. House Report at 110. We sought comment on the appropriate interpretation of this language, particularly with respect to developing standards for identifying "discrimination" governed by Sections 616 and 628.

[7] See MPAA at 4-5.

[8] See MPAA at 4-5, Time Warner Reply at 22. To the extent that the Commission seeks to define such coercive and discriminatory practices, CSS also recommends that the Commission review sample agreements between program vendors and cable operators that impose restrictive conditions on the vendor's ability to license independent or competitive multichannel distributors in the cable operators' service areas. See CSS at 17. Similarly, Caribbean Satellite Network (CSN) proposes that the Commission examine the totality of circumstances under which a cable operator requires a vendor to provide a financial interest as a condition of carriage, including a cable operator's stalling of negotiations associated with demands for financial interests. See CSN at 5.

[9] See MPAA Reply at 7.

[10] See Viacom Reply at 21.

[11] See, e.g., Cablevision at 23, Liberty Media at 67.

of whether a programmer is likely to seek mandatory carriage if rejected, rather than selecting the programming that best serves the needs of its subscribers. Continental argues that in the absence of wrongful or anticompetitive conduct, the Commission's rules should allow distributors to exercise the freedom to determine whether a particular programming service has the experience and resources to succeed.[12] Moreover, Discovery observes that most program carriage decisions are made at the local level by managers of individual systems, rather than at a national or regional level by owners of MSOs. As a result, Discovery contends that carriage decisions are generally uninfluenced by the affiliation of a program service's owners. Discovery further contends that the existence of a financial investment or an exclusive contract is not evidence of "coercion" or "required" conduct.[13]

10. Specific Prohibitions of Section 616. With respect to implementing the statute's specific prohibitions, commenters appear to focus on Section 616(a)(2)'s provision against attempts by a distributor to coerce exclusive rights as a condition of carriage. MPAA, for example, argues that, in contrast to Section 628, Section 616 does not require the Commission to "specify particular conduct that is prohibited," so that adopting generic rules would be sufficient to comply with the statute, rather than attempting to delineate specific behavior that would constitute "coercion".[14] Similarly, Viacom states that although "coercion" may include more than explicit threats or overt intimidation, the Commission should recognize that many negotiating impasses are not actionable under Section 616.[15] MPAA states that examples of activity that may involve coercion are useful as guided by industry experience, and suggests several indicators for evaluating complaints, including: (1) refusals to carry a service on terms and conditions that are reasonable or standard in the industry for comparable programming; (2) patterns of conduct during the course of dealing between the parties; (3) market dominance by a distributor obtaining exclusivity or ownership, or the absence of a comparable alternative distributor; and (4) the timing of agreement on financial interests or exclusivity relative to the agreement on carriage.[16]

11. Alternatively, several parties suggest defining "coercion" as narrowly as possible in order to avoid foreclosing the discussion of exclusivity or ownership in aggressive, good-faith negotiations, subject to the constraints of Section 628.[17] Accordingly, these parties recommend viewing "coercion" as conduct that is not reasonably considered good-faith negotiation, or that amounts to the exertion of pressure beyond mere negotiation. In order to allow for aggressive negotiations on carriage and other terms, TCI suggests that the implementing rules require that complaints alleging "coercion" demonstrate explicit threats by a distributor, stating that such practices are arguably analogous to antitrust standards regarding tying and exclusive dealing.[18] In addition, Cablevision et al. recommend a three-

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[12] See Continental at 26-27.

[13] See Discovery at 32.

[14] See MPAA at 7-9.

[15] See Viacom Reply at 22.

[16] See MPAA at 7-9.

[17] See, e.g., Discovery at 32, Liberty Media at 68, and TCI at 33-36.

[18] Using these lines of precedent, TCI cites several cases to highlight actions or conditions that would or would not evidence "coercion". See TCI at 34.

part test for identifying "coercion" or retaliatory conduct, involving: (1) the plausibility of coercion, especially with respect to established or powerful program vendors; (2) specific facts of coercion; and (3) alleged facts that the conduct has unreasonably restrained the vendor's ability to compete fairly.[19] Cablevision justifies such a standard by observing that cable operators rarely consider dropping established services in negotiations, and cable operators often provide non-monetary "value" in exchange for exclusivity -- such as placement, carriage, or other commitments -- that could rebut the claim of coercion.

12. In response, MPAA claims that TCI provides no valid support for its proposal that a finding of "coercion" must require evidence of explicit threats, stating that the provisions established by Congress in Section 616 differ from the antitrust standards referenced by TCI due to the absence of an alternative multichannel video programming distributor.[20] Furthermore, MPAA argues that coerced exclusivity is prohibited by Section 616, even if the Commission would find non-coerced exclusivity to be in the public interest under the standards set forth in Section 628. TCI states that it agrees with a case-by-case application of the implementing regulations for Section 616 in order to allow for aggressive market negotiations, but observes that MPAA's indicia are often unrelated to coercion.[21]

13. Another specific statutory provision is set forth in Section 616(a)(3), which prohibits a distributor from "engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation in the selection, terms, or conditions of carriage." MPAA recommends that the Commission consider several criteria for a prima facie showing of such discrimination, such as: (a) a refusal to carry an unaffiliated service without reasonable business justification; (b) assignment of significantly inferior channel positioning, or other type of inaccessibility to subscribers, as compared to competing affiliated services added to the system during the same time period; (c) unwillingness to engage in promotional support, cooperative advertising, or other similar activity performed for comparable affiliated services, without a reasonable business justification; (d) willingness to sell subscriber lists and addresses and other data useful in promotional activity only to affiliated programmers; (e) excluding unaffiliated programming services from mention in standard presentations to potential subscribers, when affiliated services are named; (f) requiring that unaffiliated services waive rights not waived by any comparable affiliated or unaffiliated service; (g) higher monthly payments to affiliated services than to comparable unaffiliated services without reasonable business justification; (h) imposing more onerous technical quality standards or requirements on an unaffiliated service; and (i) refusing to include a nonaffiliated service in comparable discount packages to those in which comparable affiliated services are offered to subscribers, without a reasonable business justification.[22] Viacom also agrees that discrimination in the context of carriage agreements involves different activities from those discussed under

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[19] See Cablevision et al. at 23-26.

[20] MPAA claims that TCI's discussion of the antitrust cases is incomplete in that the court decisions did not hinge on the presence of a threat. MPAA, therefore, cites the "essential facilities" doctrine as a more appropriate standard for comparison. See MPAA Reply at 4-5.

[21] See TCI Reply at 18-20.

[22] See MPAA at 10.

Section 628 regarding program access.[23] Other parties recommend that the Commission narrowly construe the prohibition against discrimination by favoring an "affiliated" vendor, so as to avoid discouraging MSO's from making favorable deals with program services in which they have invested.[24] Finally, Continental recommends using the same factors listed in Section 628(c)(2)(B) to justify a distributor's different treatment of various program vendors, including an allowance for considering creditworthiness, offering of service, financial stability, character, and technical quality.[25]

Discussion

14. In implementing the provisions of Section 616, we believe that our regulations must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations. Because the statute does not prohibit distributors from acquiring exclusivity rights or financial interests from programming vendors, we believe that resolution of Section 616 complaints will necessarily focus on the specific facts pertaining to each negotiation, and the manner in which certain rights were obtained, in order to determine whether a violation has, in fact, occurred. Accordingly, we adopt general rules that are consistent with the statute's specific prohibitions regarding actions between distributors and program vendors in forming program carriage agreements. With respect to the prohibitions set forth in Section 616(a)(1)-(3), we will identify specific behavior that constitutes "coercion" and "discrimination" as we resolve particular Section 616 complaints, because the practices at issue will necessarily involve behavior that must be evaluated within the context of specific facts pertaining to each negotiation. In addition, we observe that Section 616(a)(3) prohibits only that conduct "the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly."[26] Thus, the implementing regulations for Section 616 will require that any complainant alleging a violation of Section 616(a)(3) must demonstrate that the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.

15. We believe that this approach complies with the expressed congressional intent of the program access and carriage agreement provisions of the 1992 Cable Act, by preserving the legitimate aspects of negotiations for multichannel video programming that result in greater availability of programming to the multichannel video marketplace.[27] Indeed, we believe that these regulations will follow the statute's directive to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability" of the relevant programming.[28] We emphasize that this approach remains consistent with our objective of serving "the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices

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[23] See Viacom at 21.

[24] See, e.g., Discovery at 32, Cablevision at 26.

[25] See Continental at 25.

[26] See 47 U.S.C. § 616(a)(3).

[27] See 1992 Cable Act, Section 2(b). See also First Report and Order, MM Docket No. 92-265, 8 FCC Rcd 3403 (1993).

[28] See 1992 Cable Act, Section 2(b)(2).

common to a competitive marketplace."[29] Furthermore, as suggested in the Notice, the flexibility that is inherent in this approach will be important in our overall effort to resolve both carriage agreement and program access complaints, so that our implementing rules for Section 616 do not preclude as "coercion" any mutually acceptable arrangements that would otherwise comply with the program access provisions of Section 628.[30] We remind vendors and distributors, however, that our program access regulations prohibit exclusivity in areas unserved by a cable operator, and require prior Commission approval of any exclusivity rights provided in areas served by a cable operator before such rights may be enforced.[31]

16. At the same time, we believe that this method will preclude opportunities for distributors to restrain the ability of certain program vendors to sell programming and compete fairly through attempts to (1) require financial interests in program services as conditions for carriage, (2) coerce exclusive rights or retaliate against vendors that fail to provide such rights, or (3) discriminate among affiliated or nonaffiliated vendors in the selection, terms or conditions of carriage of multichannel video programming.[32] Thus, after reviewing the facts of individual negotiations involved in carriage agreement disputes, the Commission will be able to identify behavior that, in context, is prohibited under Section 616.

17. We also observe that the record on this aspect of the 1992 Cable Act has been extremely limited. In the absence of more explicit input from the commenters, we believe that it is neither helpful nor necessary to develop specific indicia of "coercion" at this time, contrary to the suggestions of two commenters.[33] Also, while we believe that it is unnecessary provide further illustrative guidelines, we believe that behavior such as that suggested by commenters, as described above, can provide useful guidelines for case-by-case inquiry. Such examples may be used by complainants to develop facts to support their complaints, thus serving as models for specific allegations pertaining to unfair program carriage agreements. We also reject the suggestions from commenters that supported alternative tests for identifying "coercion" or "discrimination", because we believe that the unique aspects of individual negotiations will require a more direct examination and evaluation of the facts pertaining to each complaint situation. We emphasize that the statute does not explicitly prohibit multichannel distributors from acquiring a financial interest or exclusive rights that are otherwise permissible. Thus, in the context of good faith, arms-length discussions, multichannel distributors may negotiate for, but may not insist upon, such benefits in exchange for carriage on their systems. We believe that ultimatums, intimidation, conduct that amounts to the exertion of pressure beyond good faith negotiations, or behavior that is tantamount to an unreasonable refusal to deal with a vendor who refuses to grant financial interests or exclusivity rights in exchange for carriage, should be considered examples of behavior that violates the prohibitions set forth in Section 616.

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[29] See First Report and Order at 3402; see also Notice at 194.

[30] Cite to Notice at 205.

[31] See 47 C.F.R. § 76.1002(c). Such approval requires a finding that the proposed exclusivity serves the public interest under the factors articulated in the 1992 Cable Act and set forth in § 76.1002(c) of our Rules.

[32] See 1992 Cable Act, Section 12(a)(1)-(3).

[33] We note that we believe that the case-by-case approach adopted for carriage agreements will make it unnecessary for us to thoroughly evaluate the line of antitrust precedents related to "coercion" cited by TCI, MPAA. See TCI at 33-36, MPAA at 7-9.

18. Finally, we reject TCI's suggestion that we should require evidence of explicit threats, because we believe that actual threats may not always comprise a necessary condition for a finding of coercion. Requiring such evidence would establish an unreasonably high burden of proof that could undermine the intent of Section 616 by allowing multichannel distributors to engage in bad faith negotiations that apparently would not violate the statute and our regulations simply because explicit threats were not made during such negotiations. In contrast, we believe that Section 616(a)(2) was intended to prohibit implicit as well as explicit behavior that amounts to "coercion."[34]

19. With respect to the prohibitions set forth in Section 616(a)(3), in order to distinguish between programming vendors that are "affiliated" or "nonaffiliated" with particular distributors, we adopt the attribution standard as applied in the program access rules.[35] Specifically, we will consider a vendor to be "affiliated" with respect to a multichannel distributor if the distributor holds five percent or more of the stock of the programmer, whether voting or non-voting. As in the First Report and Order on program access, we will not adopt the single majority shareholder aspect of the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation. While certain aspects of this attribution standard may be subject to reconsideration in the program access context, we will adopt a parallel standard in the absence of a detailed rationale that would distinguish the relationships in Section 616 from the vertical integration issues in the program access provisions of Section 628.[36]

IV. COMPLAINT AND ENFORCEMENT PROCEDURES

20. The Notice also sought comment on the procedures to be established for review of complaints, and on the appropriate penalties and remedies to be ordered. Section 616(a)(4) provides for expedited review of any complaints made by a video programming vendor pursuant to this section. We sought comment on: (1) whether we should follow the same review process as was discussed with respect to Section 628(d), or rather, adopt different complaint procedures; and (2) whether we should afford carriage agreements confidential treatment in full, or rather, only permit confidential or proprietary information to be redacted. Section 616(a)(5) provides that the Commission must adopt appropriate penalties and remedies for violations of this subsection, including requiring the multichannel video

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[34] We also note that on May 20, 1993, CSN filed a motion to amend the First Report and Order in MM Docket No. 92-265 and to revise procedural dates. CSN contended that various issues raised in their comments were not considered in the First Report and Order. We find that a number of the issues pertained to program carriage agreements, and are addressed in this item. To the extent that issues raised in CSN's comments were relevant to the program access provisions, we find no oversight on our part concerning their issues as they are cited in the comment summary. See, e.g., First Report and Order, Appendix C, n. 91. Accordingly, the motion filed by CSN is hereby denied.

[35] See First Report and Order at 3370; 47 C.F.R. § 76.1000(b). We note that the same attribution standard was adopted in proceeding adopting the cable rate regulation provisions of the 1992 Cable Act. See Report and Order, MM Docket No. 92-266, FCC 93-177, 58 FR 29736 (May 21, 1993).

[36] See, e.g., Petitions for Reconsideration in MM Docket No. 92-265, filed June 10, 1993 by Black Entertainment Television at 1, Discovery at 2, Liberty Media at 8, Time Warner at 7, Viacom at 2.

programming distributor to carry the unaffiliated program vendor.[37] Accordingly, we sought comment on: (1) procedures that we should establish for mandatory carriage; (2) the appropriate duration for mandatory carriage, given that we do not intend to require the multichannel distributor to carry the aggrieved programming service indefinitely; (3) guidelines that we should use to determine forfeiture amounts assessed against violators; (4) whether we should also consider ordering remedies other than forfeiture or mandatory carriage, such as establishment of prices, terms and conditions of sale, similar to the remedies specified in Section 628(e)(1).[38] In addition, Section 616(a)(6) provides that the Commission must delineate penalties to be assessed against any person filing a frivolous complaint pursuant to this section. We proposed to assess monetary forfeitures for frivolous complaints and we asked for comment on (1) the factors that should determine whether a complaint is frivolous; (2) guidelines to determine forfeiture amounts; and (3) whether we should base the forfeiture amount on the resources expended by the Commission in considering the claim and by the party defending against the claim.

Comments

21. Regarding Section 616(a)(4)'s requirement for an expedited review process for complaints by programming vendors, MPAA contends that the same standards of evidentiary support for allegations should apply to both complaints and answers. MPAA also claims that the availability of disputed carriage agreements with redacted proprietary terms would contribute to the body of precedent concerning prohibited conduct, thus deterring violations and minimizing the incidence of unsuccessful complaints. According to MPAA, these considerations appear to outweigh the need to maintain the confidentiality of the entire contract, which a distributor could still request in appropriate cases pursuant to existing Commission procedures for requesting confidential treatment.[39]

22. Regarding remedies for violations, MPAA claims that mandatory carriage should be imposed as a remedy for most violations, and that the rules should enable the Commission to set terms and conditions of carriage in appropriate cases. When carriage is ordered as a remedy, MPAA argues that it should continue for a reasonable period on non-discriminatory terms until the parties notify the Commission that they have reached a voluntary and non-abusive agreement. MPAA also believes that the rules should require consideration of a complaint within 90 days to afford meaningful relief to programming vendors.[40] Alternatively, Continental asserts that the Commission should use a remedy of mandatory carriage only rarely, and should not require it in response to a distributor's mere denial of carriage.[41] In addition, Continental believes that the Commission should not always rely on mandatory carriage, even when wrongful conduct has occurred.[42] Finally, Cablevision states

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[37] We note that the House Report states that "[t]his legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section." House Report at 111.

[38] See 47 U.S.C. § 628(e)(1).

[39] See MPAA at 11-12.

[40] See MPAA at 12-14.

[41] See Continental at 25.

[42] Id. at 27.

that remedies imposed should reflect the harm to the aggrieved vendor. Cablevision recommends limiting the time period for filing a Section 616 complaint to 90 days after the aggrieved violation. If mandatory carriage is warranted, Cablevision contends that the Commission should limit such carriage to one year plus the time period between the Commission's order and the distributor's compliance, with terms of carriage that are reasonable and customary in the industry. Cablevision also recommends that any forfeitures imposed by the Commission on a cable operator should be related to the alleged harm to the programming vendor, and should not exceed the vendor's lost profits.[43]

Discussion

23. General Procedures. We believe that a complaint process derived from the process we established for adjudicating undue influence complaints filed pursuant to Section 628(c)(2)(A) of the program access provisions of the 1992 Cable Act will provide the most flexible and expeditious means of enforcing the carriage agreement provisions of Section 616. Thus, we hereby adopt a system that promotes resolution of as many cases as possible on the basis of a complaint, answer and reply. Given the statute's explicit direction to the Commission to handle program carriage complaints expeditiously, additional pleadings will not be accepted or entertained unless specifically requested by the reviewing staff. Discovery will not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff. Cases that require a relatively contained amount of discovery (limited to written interrogatories and document production) will be resolved at the staff level and shall be subject to review directly by the Commission. Interlocutory review shall be permitted only after the staff has ruled on the merits. The ex parte rules governing restricted proceedings will be applied.

24. As a practical matter, however, given that alleged violations of Section 616, especially those involving potentially "coercive" practices, will require an evaluation of contested facts and behavior related to program carriage negotiations, we believe that the staff will be unable to resolve most program carriage complaints on the sole basis of a written record as described above. Rather, we anticipate that resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations. In such cases, after reviewing the complaint, answer and reply, the staff will inform the parties of its determination that resolution of the complaint will require a hearing before an administrative law judge (ALJ). The parties will be given the opportunity to resolve the dispute through the Commission's alternative dispute resolution process (ADR). If ADR is not selected or is unsuccessful, the case will be designated for hearing before an ALJ. Interlocutory applications for review in such cases will be similarly limited, and any decision rendered by an ALJ shall be directly appealable to the Commission. The ex parte rules governing restricted proceedings will be applied.

25. As we have required in the context of program access complaints,[44] to minimize the number of complaints brought before the Commission we will require that prior to filing a program carriage complaint, an aggrieved programming vendor must first inform the multichannel distributor of its belief that a violation of Section 616 of the 1992 Cable Act has occurred. Such notice must be sufficiently detailed so that the multichannel distributor can determine the specific nature of the potential complaint. This will give the multichannel

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[43] See Cablevision et al at 27.

[44] See 47 C.F.R. §76.1003(a).

distributor a final opportunity to resolve the dispute without involving the Commission. If the parties still cannot reach resolution, the aggrieved program vendor should file its complaint along with evidence (an affidavit or copy of a certified letter) that the required notice to the multichannel distributor has been given.[45] Complaints failing to include such evidence will be dismissed. Finally, a one year statute of limitations will apply to carriage agreement complaints. Thus, a complaint filed pursuant to Section 616 must be filed within one year of the date on which one of the following occurs: (a) the complainant enters into a carriage agreement with an multichannel distributor, which the complainant alleges involves a violation of Section 616; (b) the multichannel distributor offers to carry a vendor's programming pursuant to terms that the complainant alleges to violate Section 616; or (c) the complainant notifies an multichannel distributor that it intends to file a complaint based on a request to carry programming that has been denied for reasons that allegedly involve a violation of Section 616.[46]

26. Remedies. We note that the record offers very little guidance on the subject of remedies, and in particular, provides little insight on the appropriate scope and duration of relief in the form of mandatory carriage of the complainant's programming. Thus, we do not believe that it is possible to prescribe specific requirements for such relief at this time. Instead, we will determine the appropriate relief for program carriage violations on a case-by-case basis. Complainants will be expected to include a request for relief in their complaint, along with any relevant evidence and arguments in support of the relief requested. Available remedies and sanctions include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission.[47]

27. If a complainant seeks mandatory carriage, it should propose specific terms for such carriage, as well as an explanation of its rationale for proposing those terms, such as the existence of comparable terms in other program carriage agreements to which either the complainant or the defendant is a party, or comparable terms that have been approved by the Commission in other program carriage complaint cases. The defendant may oppose the proposed relief in its answer, and may offer alternative remedies without prejudice to any defenses it may raise or responses to the complainant's allegations. Given the wide range of behavior that may potentially give rise to a violation of the rules adopted herein to implement Section 616, we believe that a case-by-case determination of the appropriate remedies based on the specific behavior involved in a particular violation provides the only

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[45] At this time, rather than establish a specific time period for the parties to attempt to resolve the dispute before an aggrieved party may file a complaint at the Commission, we will allow the aggrieved programming vendor to determine the appropriate duration of negotiations. At a minimum, however, the programming vendor must provide the potential defendant ten (10) days to respond to the notice, and allow a reasonable time thereafter -- which will vary given the particular circumstances of each case -- for negotiations.

[46] We do not believe that 90 days, as suggested by Cablevision, provides a sufficient statute of limitations for program carriage complaints. We have adopted a one year statute of limitations for filing complaints alleging violations of our program access regulations, which may involve similar types of behavior and allegations. See 47 C.F.R. §76.1003(r). The commenters, including Cablevision, have not provided sufficient information that demonstrates the need for a more abbreviated statute of limitations for alleged violations of the program carriage requirements set forth in Section 616.

[47] For example, if the Commission finds that a carriage agreement includes a coerced financial interest or exclusivity requirement in violation of Section 616, the appropriate remedy may simply be to determine that such terms are unenforceable by the multichannel distributor, and to revise the existing agreement, ordering carriage on the same terms negotiated in that agreement without the coerced financial interest provisions or coerced promise of exclusivity.

reasonable and meaningful method of enforcing Section 616.

28. With respect to forfeitures, we disagree with the suggestion by Cablevision that the forfeiture amount must be related to the alleged harm to the programming vendor, or that it should be limited to the vendor's "lost profits." Such a standard has not provided the basis for FCC forfeitures in other contexts, nor is it set forth in the statute. Rather, the Commission will rely upon its forfeiture guidelines to determine the appropriate penalty.[48]

Complaint Process

29. Complaint. When filing a complaint, the burden of proof will be on the programming vendor to establish a prima facie showing that the defendant multichannel distributor has engaged in behavior that is prohibited by Section 616. The complaint must identify the relevant Commission regulation allegedly violated, and must describe with specificity the behavior constituting the alleged violation. The complainant must establish that it is a video programming vendor, as defined in Section 76.1300(d) of the Commission's rules, and that the defendant is an multichannel distributor as defined in Section 76.1300(c).[49] For complaints alleging discriminatory treatment that favors "affiliated" programming vendors,[50] the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a). The complaint must be supported by documentary evidence of the alleged violation, or by an affidavit (signed by an authorized representative or agent of the complaining programming vendor) setting forth the basis for the complainant's allegations. If the complaint involves a specific written program carriage agreement, that agreement should be included with the complaint with proprietary information redacted. We agree with MPAA that the availability of disputed carriage agreements with redacted proprietary terms will contribute to the body of precedent concerning prohibited conduct, and will assist parties in future negotiations by deterring violations and minimizing the instance of unsuccessful or frivolous complaints. As stated above, a one-year statute of limitations will be applied to program carriage complaints. Finally, the complaint should specify the relief requested. If the complainant seeks mandatory carriage, the complaint should specify the desired duration and terms of such carriage, and should include the rationale and any documentary evidence supporting such request. If the complainant seeks modification of an existing carriage agreement, it should specify the terms it seeks to change and should propose specific substitute provisions.

30. Answer and Reply. The defendant will be given thirty (30) days to file its answer responding to the complainant's allegations. The answer should be supported by documentary evidence, or an affidavit (signed by an officer of the defendant) that refutes each allegation made by the complainant or supports any affirmative defenses the defendant may raise. The answer should also include the defendant's response to the relief requested by complainant, as well as any documentary evidence that supports defendant's position.

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[48] See Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993).

[49] See Appendix D.

[50] See Appendix D.

The complainant will be given twenty (20) days to respond to the defendant's answer.[51]

31. Staff Determination. After reviewing the complaint, answer and reply, the staff will make what, for the purposes of these proceedings, we will deem a prima facie determination. If the complainant has not made a prima facie case of a violation of our carriage agreement regulations the complaint will be dismissed. If the staff determines that the complainant has made a prima facie showing, the staff will so rule, and will determine whether it can grant relief on the basis of the existing record. If the record is not sufficient to resolve the complaint and grant relief, the staff will determine and outline the appropriate procedures for discovery, or will refer the case to an ALJ for an administrative hearing.

32. Discovery. The staff will determine what additional information is necessary to resolve the complaint, and will develop a discovery process and timetable to resolve the dispute expeditiously.[52] Wherever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced. The staff will determine whether the materials ordered to be produced to the opposing party should also be filed with the Commission. The staff may order that any documents or answers to such inquiries will be submitted to the Commission and to the opposing party within a specified time period. Any information exchanged through discovery may be subjected to a protective order upon an appropriate showing by the relevant party that the information is proprietary.[53] If the staff cannot readily determine what additional information is needed to resolve the dispute, it

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[51] As stated above, unless specifically requested by the Commission or its staff, additional pleadings such as motions to dismiss or motions for summary judgment will not be considered. We intend to keep pleadings to a minimum to comply with the statutory directive for an expedited adjudicatory process.

[52] The staff, including ALJs, is directed herein to resolve all program carriage disputes as expeditiously as possible. Given the complexity of the issues that may be raised in such cases, as well as the likely need to resolve factual disputes, we do not believe that it is practicable or advisable to add to the administrative burdens already placed on the FCC staff by the 1992 Cable Act by imposing, at the outset, a uniform requirement on the staff to dispose of these cases within 90 days, as was suggested by MPAA in its comments.

[53] See 47 C.F.R. § 0.459. The parties will be required to take reasonable steps to prevent unauthorized access to protected documents and information. Access to protected materials will be limited to the individual complainant or defendant, the attorneys listed with the Commission as representatives of the parties, their staffs and any expert advisors or analysts. Each party is responsible for informing anyone with access to protected information that the documents or information contained therein may not be disclosed to anyone or any entity other than the Commission. Each party may require the other to disclose in writing the names of all persons who have access to documents and information subject to the protective order. The information contained in any proprietary materials may not be disclosed to any person not authorized to receive such information, and may not be used in any activity or function other than the prosecution or defense of the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's regulations and understands the limitations they impose upon the signing party. No copies of proprietary materials may be made except copies to be used by authorized persons. Each party will be required to maintain a log recording the number of copies made of all proprietary information and the persons to whom the copies were provided. Upon termination of the proceeding, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, will be provided to the producing party. Upon final termination of the proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may require. Such agreement should be confirmed in writing and filed with the Commission. Any failure to abide by the terms of the protective order may result in the imposition of sanctions, including dismissal of the complaint, or censure, suspension or disbarment of the attorneys involved. See 47 C.F.R. § 1.24. See also Appendix D.

should refer the complaint to an ALJ. The staff may also hold a status conference to conduct discovery, and is authorized to issue oral rulings at the status conference which will be confirmed to the parties in writing.

33. Upon the conclusion of any discovery, the staff may direct the parties to submit briefs, together with proposed findings of fact, conclusions of law and proposed remedies on a specified date. Reply briefs should be filed within the following fifteen (15) days. The parties will be given an additional five (5) days in which to file redacted copies of briefs and reply briefs for the public record when they contain confidential or proprietary information that is subject to a protective order. After a ruling on the merits, either party may file an application for review of the staff's determinations directly to the Commission. This ruling will include a timetable for compliance, and will become effective upon release.[54] In the absence of a stay, any relief or remedies imposed therein, with the exception of an order requiring mandatory carriage that would require the defendant to delete other programming carried on its distribution system in order to carry complainant's programming, will remain in effect pending appeal. Stays will not be routinely granted. If the staff orders mandatory carriage of the complainant's programming, and such carriage would necessitate deletion of other programming from the defendant's distribution system, the defendant need not carry the programming until the Commission has issued a final ruling on the application for review. In such cases, however, if the Commission upholds in its entirety the relief granted by the staff ruling, the defendant will be required to carry the complainant's programming for an additional time period, beyond that originally ordered by the staff, equal to the amount of time that elapsed between the staff order and the Commission's final decision, on the terms ordered by the staff and upheld by the Commission.

34. Referral to ALJ. If the staff determines that the complainant has established a prima facie case, and that disposition of the complaint will require the resolution of factual disputes or other extensive discovery, it will so advise the parties in writing. If both parties agree, they may elect to resolve the dispute through ADR. If the parties do not agree to ADR, or if ADR is unsuccessful, the staff will refer the complaint to an ALJ for an administrative hearing. As stated above, we anticipate that the majority of the program carriage complaints filed will require an administrative hearing to resolve factual disputes related to the negotiations between the parties. ALJs are expected to resolve program carriage complaints expeditiously, and should hold an immediate status conference to establish timetables for discovery, hearing and submission of briefs and proposed findings of fact and conclusions of law. Interlocutory appeals shall be permitted only after a ruling on the merits. A ruling on the merits by the ALJ must be appealed directly to the Commission. Such a ruling will include the relief granted, a timetable for compliance, and will become effective upon release. In the absence of a stay, any relief or remedies imposed therein, with the exception of an order for mandatory carriage that would require deletion of other programming, will remain in effect pending appeal. Stays will not be routinely granted. If the ALJ orders mandatory carriage of the complainant's programming, and such carriage would necessitate deletion of other programming from the defendant's distribution system, the defendant need not carry the programming until the Commission has issued a final ruling on the appeal. As in the case of a staff order, if the Commission upholds the relief granted by the ALJ in its entirety, the defendant will be required to carry the complainant's programming for an additional time period, beyond that originally ordered by the ALJ, equal to the amount of time that elapsed between the ALJ's decision and the Commission's ruling on the appeal, pursuant to the terms ordered by the ALJ and upheld by the Commission.

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[54] See 47 C.F.R. §1.102(b).

Frivolous Complaints

35. The regulations we have adopted to implement the proscriptions contained in Section 616 of the 1992 Cable Act are intended to avoid constraining aggrieved programming vendors from filing legitimate complaints, but at the same time must afford the statutory protection to multichannel distributors from frivolous complaints. We note that the commenters have offered no suggestions as to what should be deemed a "frivolous" program carriage complaint. Accordingly, as in the case of program access complaints filed under Section 628 of the 1992 Cable Act,[55] we adopt herein a regulation prohibiting the filing of frivolous complaints alleging a violation of Section 616.[56] Our regulations will also require that all complaints alleging violations of Section 616 must be accompanied by an affidavit signed by an authorized officer or agent of the complainant. To enforce the prohibition against filing frivolous complaints, we will assess monetary forfeitures in accordance with Section 503 of the Communications Act and our forfeiture regulations and policies. For purposes of Section 503(b)(5), one finding that a non-licensee complainant has filed a frivolous complaint under any provision of Section 616 will be sufficient to fulfill the citation requirements of the forfeiture provisions.[57]

36. With respect to the type of complaints that the Commission will deem frivolous, we believe that complaints filed without any effort to ascertain or review the underlying facts should be considered frivolous. We expect that the requirement adopted herein that complaints be accompanied by affidavit should assure that such complaints are based on specific and substantiated facts. When this is not the case, the complainant will be liable for sanctions for violating our rule against frivolous complaints. Similarly, complainants will be liable for sanctions for filing a frivolous complaint when that complaint is based on arguments that have been specifically rejected by the Commission in other proceedings, or for filing a complaint that has no plausible basis for relief. We expect that further standards with respect to frivolous complaints will develop as specific cases are adjudicated.

V. CONCLUSION

37. In this Second Report and Order, we adopt rules to implement the new Section 616 of the Communications Act regarding program carriage agreements. Given the program access regulations previously adopted, we recognize that enhanced availability of multichannel programming to the public will also depend upon the ability of program vendors to sell their services without becoming subject to coercive or discriminatory practices. Therefore, we seek to establish regulations that prevent multichannel programming distributors from entering into carriage agreements that are conditioned on concessions of various rights, including financial interests or exclusivity. By adopting this process to identify prohibited conduct in negotiating program carriage agreements, we believe that the implementing regulations remain consistent with the general approach in this proceeding to serve the congressional intent to prohibit unfair and anticompetitive actions without restraining the amount of multichannel programming available by precluding legitimate business practices

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[55] See 47 C.F.R. §76.1003(q).

[56] See Appendix D.

[57] See 47 U.S.C. § 503(b)(5).

common to a competitive marketplace.

VI. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

38. The Final Regulatory Flexibility Analysis is attached as Appendix C.

B. Paperwork Reduction Act Statement

39. The decision in this proceeding has been analyzed with respect to the Paperwork Reduction Act of 1980, and has been found to impose new or modified requirements or burdens upon the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

C. Ordering Clauses

40. Accordingly, IT IS ORDERED that, pursuant to Sections 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), and 303(r), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C, below, effective January 10, 1994.

41. IT IS FURTHER ORDERED that MM Docket No. 92-265 IS TERMINATED.

42. For further information in this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Section 12 of the Cable Television Consumer Protection and Competition Act of 1992

SEC. 12. REGULATION OF CARRIAGE AGREEMENTS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 615 (as added by section 5 of this Act) the following new section:

"SEC. 616. REGULATION OF CARRIAGE AGREEMENTS.

"(a) Regulations.--Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors.

Such regulations shall--

"(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

"(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

"(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

"(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

"(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

"(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(b) Definition.--As used in this section, the term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale."

Appendix B: List of Commenters

Initial Comments

1. Cablevision Industries Corporation, Comcast Cable Communications, Inc., and Cox Cable Communications
2. Caribbean Satellite Network, Inc.
3. Consumer Satellite Systems, Inc.
4. Continental Cablevision, Inc.
5. Discovery Communications, Inc.
6. Liberty Media Corporation
7. Motion Picture Association of America, Inc.
8. Tele-Communications, Inc.
9. Time Warner Entertainment Company, L.P.
10. WJB-TV Fort Pierce, L.P.

Reply Comments

1. Motion Picture Association of America
2. Sammons Communications, Inc.
3. Tele-communications, Inc.
4. Time Warner Entertainment Company, L.P.
5. Viacom International Inc.

Appendix C: Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

This action is taken to implement Section 12 of the Cable Television Consumer Protection and Competition Act of 1992.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

There were no comments submitted in response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

We have analyzed the comments submitted in light of our statutory directives and have formulated regulations which, to the extent possible, minimize the regulatory burden placed on entities covered by the program carriage agreement provisions of the Cable Act. Different entities will be affected in different ways. Some programming distributors may be forced to alter their policies for negotiating for program carriage, while other vendors may receive benefits in increased flexibility in selling their program services.

IV. Federal Rules which overlap, duplicate or conflict with these rules.

None

V. Paperwork Reduction Act Statement

The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

Appendix D: Rules

Part 76 of Title 47 of the Code of Federal Regulations is amended as follows.

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation for part 76 is revised to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 536, 542, 543, 552.

2. The heading in Subpart Q is added to read as follows:

Subpart Q -- Regulation of Carriage Agreements

3. Subpart Q is added to read as follows:

§76.1300 Definitions

As used in this subpart:

(a) Affiliated. For purposes of determining whether a video programming vendor is "affiliated" with a multichannel video programming distributor, as used in this subpart, the definitions for "attributable interest" contained in the notes to §76.501 of this chapter shall be used, provided, however that:

(1) the single majority shareholder provisions of Note 2(b) and the limited partner insulation provisions of Note 2(g) shall not apply; and

(2) the provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(b) Buying groups. The term "buying group" or "agent," for purposes of the definition of a multichannel video programming distributor set forth in paragraph (e) of this section, means an entity representing the interests of more than one entity distributing multichannel video programming that:

(1) Agrees to be financially liable for any fees due pursuant to a satellite cable programming, or satellite broadcast programming, contract which it signs as a contracting party as a representative of its members or whose members, as contracting parties, agree to joint and several liability; and

(2) Agrees to uniform billing and standardized contract provisions for individual members; and

(3) Agrees either collectively or individually on reasonable technical quality standards for the individual members of the group.

(c) **Multichannel video programming distributor.** The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

(d) **Video programming vendor.** The term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

4. Section 76.1301 is added to Subpart Q to read as follows:

§76.1301 Prohibited Practices

(a) **Financial Interest.** No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) **Exclusive rights.** No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) **Discrimination.** No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of

video programming provided by such vendors.

5. Section 76.1302 is added to Subpart Q to read as follows:

§76.1302 Adjudicatory Proceedings

Any video programming vendor aggrieved by conduct that it alleges to constitute a violation of the regulations set forth in this subpart may commence an adjudicatory proceeding at the Commission.

(a) Notice required. Any aggrieved video programming vendor intending to file a complaint under this section must first notify the defendant multichannel video programming distributor that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in §76.1301 of this subpart. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

(b) General pleading requirements. Carriage agreement complaint proceedings are generally resolved on a written record consisting of a complaint, answer and reply, but may also include other written submissions such as briefs and written interrogatories. All written submissions, both substantive and procedural, must conform to the following standards:

(1) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy should be pleaded fully and with specificity.

(2) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation, or a defense to such alleged violation.

(3) Facts must be supported by relevant documentation or affidavit.

(4) Legal arguments must be supported by appropriate judicial, Commission, or statutory authority.

(5) Opposing authorities must be distinguished.

(6) Copies must be provided of all non-Commission authorities relied upon which are not routinely

available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies.

(7) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(c) Complaint.

(1) A carriage agreement complaint shall contain:

(i) The name of the complainant and defendant;

(ii) The address and telephone number of the complainant, the type of multichannel video programming distributor that describes the defendant, and the address and telephone number of the defendant;

(iii) The name, address and telephone number of complainant's attorney, if represented by counsel;

(iv) Citation to the section of the Communications Act and/or Commission regulation or order alleged to have been violated;

(v) A complete statement of facts, which, if proven true, would constitute such a violation;

(vi) Any evidence that supports the truth or accuracy of the alleged facts, including, when relevant, any written carriage agreement between the complainant and the defendant, with proprietary information redacted;

(vii) Evidence that supports complainant's belief that the defendant, where necessary, meets the attribution standards for application of the carriage agreement regulations;

(viii) For complaints alleging a violation of Section 76.1301(c) of this subpart, evidence that supports complainant's claim that the effect of the conduct complained of is to unreasonably restrain the ability of the complainant to compete fairly;

(ix) The specific relief sought, and the rationale and any evidence in support of the relief sought.

(2) Every complaint alleging a violation of the carriage agreement requirements shall be accompanied by a sworn affidavit signed by an authorized officer or agent of the complainant. This affidavit shall contain a statement that the affiant has read the complaint and that to the best of the affiant's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted under Commission regulations and policies or is a good faith argument for the extension, modification or reversal of such regulations or policies, and it is not interposed for any improper purpose. If the complaint is signed in violation of this rule, the Commission upon motion or its own initiative shall impose upon the complainant an appropriate sanction.

(3) The following format may be used in cases to which it is applicable, with such modifications as the circumstances may render necessary:

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the matter of

Complainant,

v.

Defendant.
File No. (To be inserted by the Commission)

[Insert Subject/Nature of Violation]

Carriage Agreement Complaint

TO: The Commission.

The complainant (here insert full name of complainant, and if a corporation, the corporate title of such complainant)

1. (Here state the complainant's post office address and telephone number.)
2. (Here insert the name, defendant's method of multichannel video distribution, address and telephone number of defendant).
3. (Here insert fully and clearly the specific act or thing complained of, together with such facts as are necessary to give full understanding of the matter, including relevant legal and documentary support).

Wherefore, complainant asks (here state specifically the relief desired, including rationale and relevant legal and documentary support for such relief).

(Date)
(Name of complainant)
(Name, address, and telephone number of attorney, if any)

(4) The complaint must be accompanied by appropriate evidence demonstrating that the required notification pursuant to paragraph (a) of this

section has been made.

(d) **Answer.**

(1) Any multichannel video programming distributor upon which a carriage agreement complaint is served under this section shall answer within thirty (30) days of service of the complaint, unless otherwise directed by the Commission.

(2) The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any defendant failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint.

(3) The answer shall state concisely any and all defenses to each claim asserted and shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the answer shall specify so much of it as is true and shall deny only the remainder. The defendant may make its denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the defendant expressly admits. When the defendant intends to controvert all averments, the defendant may do so by general denial.

(4) Averments in a complaint are deemed to be admitted when not denied in the answer.

(5) The answer shall also address the relief requested in the complaint, including legal and documentary support for such response, and may include an alternative relief proposal without prejudice to any denials or defenses raised.

(e) Reply.

Within twenty (20) days after service of an answer, the complainant may file and serve a reply which shall be responsive to matters contained in the answer and shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the answer, except with respect to any affirmative defenses set forth therein.

(f) Motions.

Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.

(g) Discovery.

(1) The Commission staff may in its discretion order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories or document production.

(2) The Commission staff may in its discretion hold a status conference with the parties, pursuant to paragraph (j) of this section, to determine the scope of discovery.

(3) If the Commission staff determines that extensive discovery is required or that resolution of the complaint will require resolution of disputed facts, the staff will advise the parties that the proceeding will be referred to an administrative law judge in accordance with paragraph (m) of this section.

(h) Confidentiality of proprietary information.

(1) Any materials generated or provided by a party in the course of adjudicating a carriage agreement complaint under this provision may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. §552(b). Any party asserting confidentiality for such materials shall so indicate by clearly marking each page, or portion thereof, for which a proprietary designation is claimed. If a proprietary designation is challenged, the party claiming confidentiality will have the burden of demonstrating, by a preponderance

of the evidence, that the material designated as proprietary falls under the standards for nondisclosure enunciated in the FOIA.

(2) Materials marked as proprietary may be disclosed solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(i) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(ii) Officers or employees of the opposing party who are named by the opposing party as being directly involved in the prosecution or defense of the case;

(iii) Consultants or expert witnesses retained by the parties;

(iv) The Commission and its staff; and

(v) Court reporters and stenographers in accordance with the terms and conditions of this section. These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each individual who is provided access to the information by the opposing party shall sign a notarized statement affirmatively stating, or shall certify under penalty of perjury, that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(3) No copies of materials marked proprietary may be made except copies to be used by persons designated in paragraph (h)(2) of this section. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(4) Upon termination of the complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log recording persons who received copies of such materials, shall be provided to the

producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

(i) Other required written submissions.

(1) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. These briefs shall contain the findings of fact and conclusions of law which that party is urging the Commission to adopt, with specific citations to the record, and supported by relevant authority and analysis.

(2) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the carriage agreement requirements set forth in the Communications Act and Section 76.1301 of this subpart, as well as affidavits and exhibits.

(3) Any briefs submitted shall be filed concurrently by both the complainant and defendant at such time as is designated by the staff. Such briefs shall not exceed fifty (50) pages.

(4) Reply briefs may be submitted by either party within twenty (20) days from the date initial briefs are due. Reply briefs shall not exceed thirty (30) pages.

(5) Briefs containing information which is claimed by an opposing or third party to be proprietary under paragraph (h) of this section shall be submitted to the Commission in confidence pursuant to the requirements of §0.459 of this chapter, and shall be clearly marked "Not for Public Inspection." An edited version removing all proprietary data shall be filed with the Commission for inclusion in the public file within five (5) days from the date the unedited version is submitted and served on opposing parties.

(j) Status conference.

(1) In any carriage agreement complaint proceeding, the Commission staff may in its discretion direct the attorneys and/or the parties to appear for a conference to consider:

(i) Simplification or narrowing of the issues;

(ii) The necessity for or desirability of amendments to the pleadings, additional pleadings, or other evidentiary submissions;

(iii) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(iv) Settlement of the matters in controversy by agreement of the parties;

(v) The necessity for and extent of discovery, including objections to interrogatories or requests for written documents;

(vi) The need and schedule for filing briefs, and the date for any further conferences; and

(vii) Such other matters that may aid in the disposition of the complaint.

(2) Any party may request that a conference be held at any time after the complaint has been filed.

(3) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.

(4) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not preclude the Commission from conferring with those parties or counsel present.

(5) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of interlocutory matters relevant to the conduct of a carriage agreement complaint proceeding including, inter alia, procedural matters, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. When such

rulings require a party to take affirmative action not subject to deadlines established by another provision of this subpart, such action will be required within ten (10) days from the date of the written memorialization unless otherwise directed by the staff.

(k) Specifications as to pleadings, briefs, and other documents; subscriptions.

(1) All papers filed in a carriage agreement complaint proceeding must be drawn in conformity with the requirements of §§1.49 and 1.50 of this chapter.

(2) All averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

(3) The original of all pleadings and submissions by any party shall be signed by that party, or by the party's attorney. Complaints must be signed by the complainant. The signing party shall state his or her address and telephone number and the date on which the document was signed. Copies should be conformed to the original. Except when otherwise specifically provided by rule or statute, pleadings need not be verified. The signature of an attorney or party shall be a certification that the attorney or party has read the pleading, motion, or other paper; that to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose. If any pleading or other submission is signed in violation of this provision, the Commission shall upon motion or upon its own initiative impose upon the party an appropriate sanction. Where the pleading or submission is signed by counsel, the provisions of §§1.52 and 1.24 of this chapter shall also apply.

(l) Copies; service.

(1) The complainant shall file an original plus three copies of the complaint with the Commission.

(2) An original plus two copies shall be filed of all pleadings and documents other than the complaint.

(3) The complainant shall serve the complaint on each defendant at the same time that it is filed at the Commission.

(4) All subsequent pleadings and briefs, as well as all letters, documents or other written submissions, shall be served by the filing party on all other parties to the proceeding, together with proof of such service in accordance with the requirements of §1.47 of this chapter.

(5) The parties to any carriage agreement complaint proceeding brought pursuant to this section may be required to file additional copies of any or all papers filed in the proceeding.

(m) Referral to administrative law judge.

(1) After reviewing the complaint, answer and reply, and at any stage of the proceeding thereafter, the Commission staff may, in its discretion, designate any carriage agreement complaint proceeding for an adjudicatory hearing before an administrative law judge.

(2) Before designation for hearing, the staff shall notify, either orally or in writing, the parties to the proceeding of its intent to so designate, and the parties shall be given a period of ten (10) days to elect to resolve the dispute through alternative dispute resolution procedures, or to proceed with an adjudicatory hearing. Such election shall be submitted in writing to the Commission.

(3) Unless otherwise directed by the Commission, or upon motion by the Mass Media Bureau Chief, the Mass Media Bureau Chief shall not be deemed to be a party to a carriage agreement complaint proceeding designated for a hearing before an administrative law judge pursuant to this paragraph.

(n) Petitions for reconsideration.

Petitions for reconsideration of interlocutory actions by the Commission's staff or by an administrative law judge will not be entertained. Petitions for reconsideration of a decision on the merits made by the Commission's staff should be filed in accordance with §§1.104-1.106 of this chapter.

(o) Interlocutory review.

(1) Except as provided below, no party may seek review of interlocutory rulings until a decision on the merits has been issued by the staff or administrative law judge.

(2) Rulings listed in this paragraph are reviewable as a matter of right. An application for review of such ruling may not be deferred and raised as an exception to a decision on the merits.

(i) If the staff's ruling denies or terminates the right of any person to participate as a party to the proceeding, such person, as a matter of right, may file an application for review of that ruling.

(ii) If the staff's ruling requires production of documents or other written evidence, over objection based on a claim of privilege, the ruling on the claim of privilege is reviewable as a matter of right.

(iii) If the staff's ruling denies a motion to disqualify a staff person from participating in the proceeding, the ruling is reviewable as a matter of right.

(p) Expedited review.

(1) Any party to a carriage agreement complaint proceeding aggrieved by any decision on the merits issued by the staff pursuant to delegated authority may file an application for review by the Commission in accordance with §1.115 of this chapter.

(2) Any party to a carriage agreement complaint proceeding aggrieved by any decision on the merits by an administrative law judge may file an appeal of the decision directly with the Commission, in accordance with §1.276(a) and §§1.277(a)-(c) of this

chapter, except that unless a stay is granted by the Commission, the decision by the administrative law judge will become effective upon release and will remain in effect pending appeal.

(q) Frivolous complaints.

It shall be unlawful for any party to file a frivolous complaint with the Commission alleging any violation of this subpart. Any violation of this paragraph shall constitute an abuse of process subject to appropriate sanctions.

(r) Statute of limitations.

Any complaint filed pursuant to this subsection must be filed within one year of the date on which one of the following events occurs:

(1) the multichannel video programming distributor enters into a contract with the complainant that the complainant alleges to violate one or more of the rules contained in this subpart; or

(2) the multichannel video programming distributor offers to carry the complainant's programming pursuant to terms that the complainant alleges to violate one or more of the rules contained in this subpart; or

(3) the complainant has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart.

(s) Remedies for violations.

(1) - **Remedies authorized.** Upon completion of such adjudicatory proceeding, the Commission shall order appropriate remedies, including, if necessary, mandatory carriage of complainant's programming on defendant's video distribution system, or the establishment of prices, terms, and conditions for the carriage of complainant's programming. Such order shall set forth a timetable for compliance, and shall become effective upon release, unless any order of mandatory carriage would require the defendant multichannel video programming distributor

to delete existing programming from its system to accommodate carriage of complainant's programming. In such instances, if the defendant seeks review of the staff or administrative law judge decision, the order for carriage of complainant's programming will not become effective unless and until the decision of the staff or administrative law judge is upheld by the Commission. If the Commission upholds the remedy ordered by the staff or administrative law judge in its entirety, the defendant will be required to carry the complainant's programming for an additional period of time equal to the time elapsed between the staff or administrative law judge decision and the Commission's ruling, on the terms and conditions approved by the Commission.

(2) Additional sanctions. The remedies provided in paragraph (s)(1) of this section are in addition to and not in lieu of the sanctions available under title V or any other provision of the Communications Act.

6. Sections 76.1303-76.1305 are reserved.

* * * * *

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-467
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Cable Television Consumer	)	MM Docket 92-259
Protection and Competition	)	
Act of 1992	)	

STAY ORDER

Adopted: October 5, 1993 ; Released: October 5, 1993

By the Commission:

1. On March 11, 1993 the Commission adopted a Report and Order[1] in this proceeding to implement the mandatory television broadcast signal carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act").[2] We have received two separate requests seeking relief from two different provisions of our rules which were adopted in from this proceeding. The Wireless Cable Association ("WCA") and the National Private Cable Association ("NPCA") filed an Emergency Motion for Partial Stay on September 29, 1993, requesting that the Commission stay the effectiveness of the specific provisions of Section 76.64(e), pending the Commission's decision on WCA's Petition for Partial Reconsideration, which requests a revision of this rule.[3] In an Emergency Petition for Temporary Waiver filed on August 4, 1993, Media-Com Television, Inc. ("Media-Com") seeks a temporary waiver of Section 76.62(e) pending the Commission's action on petitions

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[1] Report and Order in MM Docket 92-259, 8 FCC Rcd 2965 (1993). See also, Clarification Order, 8 FCC Rcd 4142 (1993), and Order, 58 FR 40366 (July 28, 1993).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§4-6, 106 Stat. 1460 (1992).

[3] The Wireless Cable Association filed a Petition for Partial Reconsideration on May 3, 1993. The National Cable Television Association and Time Warner filed Oppositions to the Wireless Cable Association's Petition for Partial Reconsideration. The specific requests for a revision of this rule will be addressed by the Commission in a separate order, along with other issues raised by the parties in the petitions for reconsideration.

for reconsideration requesting modification of this rule with respect to signals carried pursuant to retransmission consent agreements.[4] Because both of these requests relate to the retransmission consent provisions of our rules, which will become effective October 6, 1993, we will address both requests herein.

2. With respect to the WCA and NPCA's request, Section 76.64(e) of the Commission's rules provides that the "[p]rovision of local broadcast signals by master antenna television (MATV) facilities or by VHF/UHF antennas on individual dwellings is not subject to retransmission consent, provided that these signals are available without charge at the residents' option. That is, the antenna facilities must be owned by the individual subscriber or building owner and not under the control of the mutlichannel video programming distributor." WCA and NPCA request that the Commission exclude from retransmission consent requirements those wireless cable and private cable systems that provide access to VHF/UHF rooftop antennas at no charge, regardless of antenna ownership, until the Commission addresses the requested revision to this rule.

3. In their motion, WCA and NPCA argue that ownership or control of the antenna should not be the determining factor as to whether retransmission consent must be obtained. Instead, they argue that as long as the broadcast signals are provided free of charge, over a VHF/UHF antenna, then the ownership of the antenna should not matter. WCA and NPCA point to the unintended affects which the current version of the rule will have on wireless and private cable operators. Most specifically, even where a wireless operator has obtained the consent of all but one local broadcaster for the retransmission of their signals, if one broadcaster in the market refuses consent, such refusal will effectively negate the consent of all other broadcasters. The wireless or private cable operator would immediately be forced to disable or retrieve all of the VHF/UHF antennas in the field. WCA and NPCA further claim that the inability of a wireless or private cable operator to provide a common VHF/UHF antenna to homeowners, even without charge, to improve reception of local broadcast signals would seriously jeopardize the continued viability of most wireless or private cable operators. Alternatively, the wireless or private cable operator must immediately transfer ownership and control of the antennas to each individual subscriber, at a significant financial loss to the operator, who generally reuses such equipment at the termination of service. If the subscriber is asked to pay the operator for the antenna, WCA and NPCA claim, most subscribers will discontinue service.

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[4] Newhouse Broadcasting Corporation and Columbia International, L.P. addressed this issue in their petitions for reconsideration. Media-Com filed comments supporting these petitioners on this issue on May 28, 1993.

4. We are persuaded by the evidence submitted by WCA and NPCA that wireless and private cable operators have raised issues which warrant further consideration, due to the detrimental consequences to wireless and private cable systems. We are also persuaded that these operators may be threatened with an imminent loss either of their subscriber base, if retransmission consent cannot be obtained from all local broadcasters, or from the forced transfer of ownership of the VHF/UHF antenna equipment. Accordingly, we will grant the request and stay the provisions of Section 76.64(e) of our rules as it applies to wireless and private cable operators who are providing local broadcast signals via a VHF/UHF antenna for which no charge is made to the subscriber, until such time as we have addressed the issue in the pending petition for reconsideration. Our action is intended to provide us with an opportunity to fully consider the specific issues raised and the oppositions thereto. It also is intended to provide wireless and private cable operators with an opportunity to continue retransmission consent negotiations. We note that no television broadcast stations or associations have objected to the relief requested. We emphasize that this stay is limited both in duration and scope, and is being granted in response to the specific showing of imminent harm on the part of WCA and NPCA. We are cognizant of the oppositions filed by NCTA and Time Warner to WCA's Petition for Partial Reconsideration and we will address those concerns more fully when we act of that petition.

5. With respect to Media-Com's request for waiver, Section 76.62(a) requires the carriage of the entire program schedule of any television station carried by a cable system.[5] This requirement covers stations carried pursuant to retransmission consent agreements as well as must-carry stations.[6] The only exception to the "carriage in its entirety" requirement is that specific programming that is prohibited under Section 76.67 (sports blackout rule) or subpart F of Part 76 of our rules (network nonduplication and syndicated exclusivity).

6. Media-Com is the licensee of low power television station W29AI, Akron, Ohio. W29AI has been carried on the Warner Cable system serving Summit County, Ohio, including Akron, on a part-time basis under a private agreement. The programming carried by this cable system is locally-produced and community-oriented. While Warner has notified Media-Com that it wishes to continue carriage of this locally-produced programming, it has indicated that it has no interest in carrying the syndicated programming broadcast by W29AI. Thus, Warner believes that a strict reading of Section 76.62(a) requires it to terminate its carriage agreement with the station.

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[5] 47 C.F.R. §76.62(a).

[6] See 8 FCC Rcd 3003-3004.

7. Media-Com requests a temporary waiver to permit Warner Cable to continue carrying its station's locally-originated programming until the resolution of the matter on reconsideration. Media-Com states that the waiver is needed to avoid an interim loss to the public of its present cable access to the locally-produced programming broadcast by W29AI. Media-Com notes that this programming, which includes local news, talk, information, religious and sports programs, is community-oriented and often unique. In some cases, W29AI is the only source of up-to-the-minute coverage of important local news stories.[7] Thus, it argues, the requested waiver serves the public interest and should be granted.

7. We are persuaded by the evidence submitted by Media-Com that its station provides programming that serves the needs of subscribers to the Warner Cable system in Summit County. We also believe that there may be other similar arrangements between broadcasters and cable operators which have long benefitted the subscribers of cable systems and which would be affected in the same manner as Media-Com. As we have not had an opportunity to fully reconsider this issue, a stay will prevent any disruption of this programming service. Moreover, we note that Warner Cable has not opposed this request, and, indeed, appears willing to continue the carriage of this locally-produced programming. We believe that other cable operators would similarly welcome the opportunity to maintain the status quo in this regard, pending our decision on reconsideration. In addition, we are concerned that absent a stay of our rule, Media-Com and similarly situated parties will have difficulty regaining carriage if the system is forced to remove the signal due to the provisions of this rule, and petitioners are subsequently successful on the merits of the petitions for reconsideration. Accordingly, on our own motion, we will stay the provisions of Section 76.62(a) of our rules as it applies to existing arrangements between broadcasters and cable operators for partial carriage until resolution of this matter in the pending reconsideration proceeding. Our action is intended to provide us an opportunity to fully consider the specific issues described above. We emphasize that this stay is limited both in duration and scope and is being granted in response to a specific showing of imminent loss of local programming.

5. Accordingly, IT IS ORDERED that pursuant to Section 4(i) and 4(j) of the Communications Act of 1934, as amended, the provisions of Sections 74.64(e) and Section 76.62(a) of the Commission's rules are STAYED until the release date of the Commission's Reconsideration Order in MM Docket No. 92-259 only to the extent provided herein with respect to the issue of antenna ownership and the issue of the continued validity of existing

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[7] Media-Com cites its extended live coverage of the recent Lucasville Prison riot as an example.

arrangements between broadcasters and cable operators for partial carriage of the broadcaster's signal.

6. For further information on this proceeding, contact Elizabeth W. Beaty, Mass Media Bureau, (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William C. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 94-204

In the Matter of	)	
	)	
Southwestern Bell Telephone Company	)	Transmittal No. 2297
	)	
Revisions to Tariff F.C.C. No. 73	)	

ORDER

Adopted: March 4, 1994; Released: March 4, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On September 16, 1993, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2297 to revise its Tariff F.C.C. No. 73.[1] This transmittal would allow SWBT to offer, in response to a bona fide request from a customer or potential customer, a bid for a tariffed service or for a special service arrangement at prices that may differ from those in effect in this tariff.[2] Tariff F.C.C. No. 73 at 1st Revised Page 2-17.

2. SWBT indicates in Transmittal 2297 that the tariff language it proposes is identical to Section 3.9 of Teleport Communications Group (TCG) Tariff F.C.C. No. 1.[3] Description and Justification (D&J) at Page 2-3. SWBT states that the Common Carrier Bureau (Bureau) rejected the requests of SWBT and other carriers to investigate TCG Tariff No. 1 and similar tariffs of other carriers.[4] SWBT further states that the Bureau

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[1]Transmittal 2297 also introduced a service entitled "900 Call Restriction," in accordance with the Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, 8 FCC Rcd 6885 (1993). No petitioner challenged the introduction of this service, and the tariff provisions establishing it became effective on October 31, 1993.

[2]Section 2.1.4(J) provides: "Prices quoted in response to such requests may be different from those in effect in this tariff. An individual case base arrangement will be offered to the subscriber for acceptance in writing. Such individual case base arrangements will specify among other things, length of service, minimum volume of service required, and the rates and charges for the proposed service."

[3]TCG Tariff F.C.C. No. 1, Transmittal No. 1 (filed Feb. 8, 1993). TCG subsequently withdrew these provisions from its tariff. TCG Tariff F.C.C. No. 1, Transmittal No. 4 (filed Nov. 4, 1993).

[4]Teleport Communications Group Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 1, et al., 8 FCC Rcd 3611 (Com.Car.Bur. 1993)(TCG Tariff Order), app. rev. pend., Application for Review of Southwestern Bell Telephone Company (filed June 10, 1993)(parties did not demonstrate a basis for initiating rejection or investigation of a tariff already in effect).

did not address SWBT's and Bell Atlantic's arguments specifically, but stated that the parties to the proceedings had not demonstrated a basis for initiating a proceeding to determine the lawfulness of TCG's tariff. SWBT declares that it wishes to take advantage of the flexibility that TCG and the other nondominant carriers are allowed to use. SWBT maintains that if it is not allowed the same flexibility as TCG to enter into individualized contracts for tariffed services and special services, the Commission will be denying SWBT its constitutional right to equal protection under the law. D&J at Pages 2-1 - 2-2.

3. SWBT states that it will file these specialized arrangements "in compliance with applicable laws," but that it does not propose removing or modifying the individual case basis (ICB) arrangements that are presently listed in its tariff.[5] D&J at Page 2-3. Transmittal No. 2297 is scheduled to become effective March 5, 1994.

4. On October 1, 1993, MCI Telecommunications Corporation (MCI), MFS Communications Company, Inc. (MFS), Sprint Communications Company LP (Sprint), Teleport Communications Group Operating Companies (TCG) and WilTel, Inc. (WilTel) filed petitions to reject Transmittal 2297, while a group of petitioners, comprised of CGI, CommuniGroup, Inc., Express Tel, NTS Communications, Inc., Tel America, Telephone Express, and VarTec Telecom, Inc. (Joint Petitioners), filed a petition to reject or, in the alternative, to suspend and investigate Transmittal 2297. SWBT replied on October 12, 1993. On December 17, 1993, SWBT filed a motion to supplement the record.[6] For reasons discussed in greater detail below, the Bureau rejects Transmittal 2297.

II. SUMMARY OF PLEADINGS

A. Petitions

5. The petitioners argue that this filing violates the DS3 ICB Order restrictions against local exchange carriers (LECs) engaging in ICB pricing.[7] Joint Petitioners' Petition at 3-4; MCI Petition at 4; MFS Petition at 2-3; Sprint Petition at 2-3; TCG Petition at 4-5; Wiltel Petition at 1-3. MFS also argues that SWBT has not complied with

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[5]SWBT provides customers with services that are not offered under its tariff at rates on an individual case basis (ICB). See, e.g., SWBT Tariff F.C.C. No. 3, 2nd Revised Page 7-215 (effective Sept. 1, 1992)(provides AT&T Communications with certain wideband analog services between Oklahoma City and Ardmore and Lawton, Oklahoma).

[6]In its supplement, SWBT insists that TCG's withdrawal of Section 3.9 of its tariff is no basis for the Commission to reject similar language in SWBT's tariff. According to SWBT, it should be entitled to rely on the Common Carrier Bureau's (Bureau's) ruling that allowed TCG's tariff to become effective. SWBT Supplement at 2-4. SWBT's motion to supplement the record is granted.

[7]Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, GTE Telephone Operating Companies, CC Docket No. 89-305, Revisions to Tariff F.C.C. No. 1, 4 FCC Rcd 8634 (DS3 ICB Order) (Commission, concluding that ICB pricing of DS3 service is discriminatory, allowed LECs to offer ICB pricing only for specialized arrangements for DS3 and dark fiber services that are not generally available in LECs' generic tariff and only for the length of time necessary to establish general rates for that service).

the DS3 ICB Reconsideration Order requirement that LECs provide justification for offering a particular service on an ICB basis.[8] MFS Petition at 2-3.

6. MCI contends that Transmittal 2297 would allow SWBT to charge similarly situated users different rates for the same currently tariffed, generally available access services. These revisions, argues MCI, are unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and should be rejected. MCI Petition at 2-3; see also Joint Petitioners' Petition at 5; Sprint Petition at 4. MCI further asserts that SWBT's requirement for a bona fide request is simply an anticompetitive device that would allow SWBT to deny service requests whenever it determines that competitive conditions do not warrant special pricing or terms. MCI Petition at 3. Moreover, argues MCI, SWBT's failure to define "bona fide request" violates Section 203 of the Act, 47 U.S.C. § 203, and Section 61.54 of the Commission's Rules, 47 C.F.R. § 61.54, which require that tariff language be clear and unambiguous. Id. at 3, n.6.

7. Wiltel declares that SWBT's tariff violates the Modification of Final Judgment (MFJ) requirement that Bell Operating Companies provide interexchange carriers and information service providers access on a tariffed basis that is "equal in type, quality and price" to that provided AT&T.[9] Wiltel Petition at 3-4. The Joint Petitioners, MCI, MFS, and TCG declare, inter alia, that the Commission previously rejected SWBT's argument that it is entitled, under the equal protection provisions of the U.S. Constitution, to enjoy the same pricing flexibility as SWBT's nondominant competitors. Joint Petitioners' Petition at 6-9; MCI Petition at 5; MFS Petition at 3; TCG Petition at 1-4; Wiltel Petition at 4-5 (citing, inter alia, Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752, 6754 at n.21 (1993)(Nondominant Carrier Tariff Order). See also Sprint Petition at 2-3 (citing Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorized Therefor, First Report and Order, 85 FCC 2d 1, 12-20 (1980).

B. Reply

8. In its reply, SWBT states that because it "has not even proposed a single use of the pending language" in this filing, it is too soon to reject Transmittal 2297 on the argument that it results in unreasonable discrimination. SWBT Reply at 3-5. SWBT further contends that the DS3 ICB Order can be interpreted as restricting nondominant carriers, such as TCG, from offering ICB pricing for their tariffed access service. Id. at 11-14. Moreover, argues SWBT, the DS3 ICB Order does not appear to foreclose SWBT from offering customer specific prices in the future. Id. at 14-16.

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[8]Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842, 4846 (1990)(DS3 ICB Reconsideration Order)(conclusion that LECs must justify all departures from general rates not limited to DS3s or DS3-equivalents).

[9]U.S. v. AT&T, 552 F.Supp. 131, 227 (D.D.C. 1982), aff'd sub nom. Maryland v. U.S., 460 U.S. 1001 (1983).

9. SWBT then denies that Transmittal 2297 violates the MFJ requirements. Id. at 16-17. Finally, SWBT reiterates that it is entitled to the same pricing flexibility as its nondominant competitors, as a matter of equal protection under the U.S. Constitution. Id. at 17-23.

III. DISCUSSION

10. As an initial matter, the tariff language proposed in Transmittal 2297 is unclear and ambiguous in violation of Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2. Section 61.2 requires that tariff publications contain clear and explicit explanatory statements regarding the rates and regulations contained in a tariff. In addition, Section 61.54(j) of the Rules, 47 C.F.R. § 61.54(j), requires that general rules (including definitions), regulations, exceptions and conditions that govern the tariff must be stated clearly and definitely. The tariff language in Transmittal 2297 violates both of these rule sections. It is impossible to discern from that language how SWBT would exercise its discretion in selecting the services to be provided as an ICB arrangement or the circumstances under which it would provide or deny that service to a particular customer. Moreover, it is not clear whether SWBT would file tariffs for these proposed ICB arrangements. Finally, it is unclear from the face of the tariff what would constitute a bona fide request. Section 61.1 of the Commission's Rules, 47 C.F.R. § 61.1, states that failure to comply with any provisions of Part 61 may be grounds for rejection of the non-complying provisions. Because the mechanism for providing service, as well as what service would or would not be provided, are unclear, we must reject Transmittal 2297 as violative of Part 61 of the Commission's Rules.

11. Moreover, although SWBT argues that it should be allowed the same tariffing flexibility as TCG, it cites no Commission precedent to support this claim. Because they lack market power, nondominant carriers such as TCG are subject to streamlined tariff regulation -- their tariffs are presumptively lawful, may be filed on one day's notice, and without cost support information.[10] TCG's tariff was permitted to take effect pursuant to these requirements. SWBT, however, is a dominant carrier whose tariffs are subject to a higher level of scrutiny. As explained above, Transmittal 2297 violates the Commission's Rules and is rejected. In any case, TCG withdrew Section 3.9, and SWBT's argument is now moot.

12. We also find that SWBT's constitutional challenge is insufficient to justify the instant tariff filing. The Commission has previously found that the dominant/nondominant regulatory classification does not violate any constitutional "equal protection" guarantee.[11] For the reasons explained above, SWBT's Transmittal 2297 violates Sections 61.2 and 61.45(j), is patently unlawful, and is rejected.

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[10]Nondominant Carrier Tariff Order, 8 FCC Rcd at 6755.

[11]Id. at 6754, n.21.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the motion to supplement the record, filed by Southwestern Bell Telephone Company, IS GRANTED.

14. IT IS FURTHER ORDERED that, pursuant to Section 61.1 of the Commission's Rules, 47 C.F.R. Part 61.1, the tariff revisions regarding individualized special service arrangements filed by Southwestern Bell Telephone Company in Tariff F.C.C. No. 73, Transmittal No. 2297, ARE REJECTED.

15. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL FILE tariff revisions to become effective on one day's notice, no later than five business days from the release of this Order, in order to remove the rejected materials and reinstate the currently effective material.

16. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59. Southwestern Bell Telephone Company should cite the "DA" number of the instant Order as the authority for this filing.

17. IT IS FURTHER ORDERED that the petitions to reject Southwestern Bell Tariff F.C.C. No. 73, Transmittal No. 2297, filed by MCI Telecommunications Corporation, MFS Communications Company, Inc., Sprint Communications Company LP, Teleport Communications Group, and WilTel, Inc., ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

18. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate Southwestern Bell Tariff F.C.C. No. 73, Transmittal No. 2297, filed by CGI, CommuniGroup,Inc., Express Tel, NTS Communications, Inc., Tel America, Telephone Express, and VarTec Telecom, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz

Kathleen B. Levitz
Acting Chief, Common Carrier Bureau

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